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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

MAY 31, 2022

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APPEAL AND ERROR

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Preservation of issues—constitutional argument—raised and ruled upon—Plaintiff properly preserved her argument regarding the constitutionality of Chapter 50B where plaintiff's counsel raised the issue before the trial court—by asserting that the statute was unconstitutional based on a recent opinion of the United States Supreme Court, stating that there was no rational basis for the statutory provision at issue, and citing an out-of-state case in support of plaintiff's argument—and obtained a ruling from the trial court. **M.E. v. T.J., 539.**

Preservation of issues—jury instructions—specific request—Defendant failed to properly preserve his challenge to the trial court's jury instructions in his trial for first-degree murder—that the trial court allegedly erred by not instructing that defendant was presumed to have had a reasonable fear of imminent death or great bodily injury—where defendant did not specifically request the instruction but rather simply requested that the trial court instruct the jury in accordance with N.C.P.I. - Crim. 308.10. **State v. Benner, 621.**

Preservation of issues—mandatory joinder—raised for first time on appeal—challenge to N.C. law—Defendant did not properly preserve her mandatory joinder argument—that the opinion of the Court of Appeals declaring a portion of Chapter 50B unconstitutional must be vacated and remanded for the mandatory joinder of the General Assembly pursuant to Civil Procedure Rule 19(d)—where the mandatory joinder issue was first raised by the Court of Appeals' dissenting opinion. Even assuming that Rule 19(d) mandatory joinder may be raised for the first time on appeal, plaintiff's Chapter 50B action for obtaining a domestic violence protective order—in which plaintiff asserted an as-applied constitutional defense to prevent dismissal of her action—did not qualify as a civil action challenging the validity of a North Carolina statute. **M.E. v. T.J., 539.**

CIVIL PROCEDURE

Voluntary dismissal—amended by hand—functional Rule 60(b) motion—domestic violence protective order action—Where plaintiff dismissed her Chapter 50B domestic violence protective order action but, thirty-nine minutes later, struck through the notice and wrote "I do not want to dismiss this action" on the Notice of Voluntary Dismissal form, the trial court acted within its broad discretion in exercising jurisdiction over the Chapter 50B complaint. Plaintiff's amended notice of dismissal functionally served as a motion for equitable relief under Civil Procedure Rule 60(b), and her later amendment to the complaint, which defendant consented to, functionally served as a refiling. **M.E. v. T.J., 539.**

CONTRACTS

Tortious interference with contract—specific pleading requirements—no rebuttal to qualified privilege—In a complex business case, where a corporation's former CEO (plaintiff) accused two shareholders and the minority shareholder's managing partner (defendants) of inducing the corporation to violate plaintiff's employment agreement, the trial court properly dismissed plaintiff's claim for tortious interference with contract for failure to state a claim. Plaintiff did not comply with the specific pleading requirements for tortious interference claims where his complaint made conclusory, general allegations that defendants had acted with malice. Further, the complaint failed to rebut the presumption that the shareholders—as corporate "non-outsiders"—acted in the corporation's best interest, and also failed to rebut the qualified privilege afforded to stockholders to interfere with a corporation's contracts with third parties. **Button v. Level Four Orthotics & Prosthetics, Inc., 459.**

CRIMINAL LAW

Post-conviction DNA testing—availability after guilty plea—materiality—In a case arising from a fatal shooting in connection with a robbery, defendant's guilty plea to second-degree murder did not disqualify him from seeking post-conviction DNA testing pursuant to N.C.G.S. § 15A-269. Nevertheless, the trial court properly denied defendant's motion for post-conviction DNA testing of the shell casings and projectile found at the crime scene, where he failed to show that the test results would be material to his defense (according to credible eyewitness testimony, defendant was one of two people involved in the crime, and therefore the presence of another's DNA on the shell casings or projectile would not necessarily have exonerated him). **State v. Alexander, 572.**

Post-conviction motions—newly discovered evidence—Beaver factors—satisfied—The trial court did not abuse its discretion by granting defendant, who had been convicted of first-degree murder more than twenty years earlier, a new trial on the grounds of newly discovered evidence pursuant to N.C.G.S. § 15A-1415(c), where defendant satisfied the factors set forth in *State v. Beaver*, 291 N.C. 137 (1976). Despite some internal inconsistencies in the newly discovered testimony, the court properly found that the testimony was "probably true;" defendant's lawyer exercised due diligence in procuring the testimony—that is, the diligence reasonably expected from someone with limited information about the testimony—by hiring an investigator to track down the witness; the testimony constituted material, competent, and relevant evidence where the State did not object to it and where it was admissible under the residual exception to the hearsay rule (Evidence Rule 803(24)); and the testimony—revealing another person's confession to committing the murder—was of a nature that a different result would probably be reached at a new trial. **State v. Reid, 646.**

DECLARATORY JUDGMENTS

Jurisdiction—actual controversy—former CEO's contractual rights upon termination of employment—In a complex business case, where a corporation's former CEO sought a declaratory judgment setting forth his rights under his employment agreement with the corporation and under various related contracts with the corporation's majority shareholder—and where the determinative issue was whether

the corporation terminated his employment with or without cause—the trial court lacked subject matter jurisdiction over the CEO's declaratory judgment claim against the majority shareholder. The complaint failed to show an actual controversy between the parties that was practically certain to result in litigation, where the decision to terminate the CEO lay with the corporation, the complaint did not allege that the CEO or the majority shareholder had attempted to exercise their rights under the various contracts, and it was impossible to speculate on appeal whether any future acts by the shareholder would constitute a breach. **Button v. Level Four Orthotics & Prosthetics, Inc., 459.**

HOMICIDE

First-degree murder—self-defense—jury instructions—In the first-degree murder prosecution for defendant's fatal shooting of an unarmed man in defendant's home, the trial court did not err when it declined to instruct the jury in accordance with North Carolina Pattern Jury Instruction (N.C.P.I.) - Crim. 308.10 where the trial court adequately conveyed the substance of defendant's requested instruction to the jury. The instructions delivered to the jury stated that defendant had no duty to retreat, and the N.C.P.I.'s language concerning defendant's right to "repel force with force regardless of the character of the assault" was not required under the circumstances. Further, defendant failed to establish a reasonable possibility that the outcome would have been different if the trial court had issued defendant's requested jury instructions. **State v. Benner, 621.**

INDICTMENT AND INFORMATION

Attempted armed robbery—victims not specifically named—pleading requirements—An indictment for attempted armed robbery was not fatally defective where it designated "employees of the Huddle House located at 1538 NC Highway 67 Jonesville, NC" as victims without specifically naming them. The indictment satisfied the criminal pleading requirements set forth in N.C.G.S. § 15A-924(a)(5) (requiring a plain and concise statement asserting facts supporting each element of the crime), and it did not fail to protect defendant from double jeopardy by omitting the victims' names, especially where the Criminal Procedure Act had relaxed the stricter common law pleading rules. In fact, the reference to a particular group of people protected defendant from any future prosecutions involving any individual from that group. **State v. Oldroyd, 613.**

JURISDICTION

Personal—long-arm statute—due process—CEO's contractual rights after termination—extent of control by shareholders—In a complex business case, where the parties disputed a former CEO's rights under his employment agreement with a North Carolina corporation and under various related contracts with the corporation's majority shareholder (a Florida company), and where the CEO accused the Florida company and the minority shareholder's managing partner of inducing the corporation to terminate the CEO for cause, the trial court properly exercised personal jurisdiction over the Florida company and the managing partner. To varying degrees, the Florida company—through one of its managers, who also acted as the North Carolina corporation's sole director—and the managing partner exercised control over the North Carolina corporation and were actively involved in negotiating terms of the contracts at issue and in firing the CEO, thereby satisfying the

"substantial activity" requirement under North Carolina's long-arm statute and the "minimum contacts" requirement for due process. **Button v. Level Four Orthotics & Prosthetics, Inc., 459.**

PUBLIC OFFICERS AND EMPLOYEES

State Health Plan amendments—constitutional contractual impairment claim—existence of contractual obligation—In an action asserting that amendments to the State Health Plan (SHP) removing premium-free options for retired state employees violated both the federal and state constitutions (the Contracts Clause and the Law of the Land Clause, respectively), retirees had a vested right to the noncontributory health plan benefits that existed at the time they were hired and for which they met the eligibility requirements because employees relied on the promise of the State's obligation to provide those benefits when they entered into the employment contract. However, summary judgment was inappropriate where there were genuine issues of material fact regarding whether the amendments constituted a substantial contractual impairment—the determination of which required an analysis of the relative value of different health plans offered at different times—and, if so, whether the impairment was reasonable and necessary to serve an important public purpose. Therefore, the matter was remanded for further factual findings by the trial court. **Lake v. State Health Plan for Tchrs. & State Emps., 502.**

UNEMPLOYMENT COMPENSATION

Good cause—attributable to employer—employee's burden—Petitioner, a former service technician for a security company, was disqualified from receiving unemployment benefits where, although he had good cause to leave his employment, he failed to carry his burden of showing that his resignation was attributable to his employer. In response to petitioner's ongoing knee pain, the employer had made an out-of-state administrative position available and attempted to give petitioner assignments that were less strenuous on his knees; however, petitioner rejected the out-of-state position, did not take additional Family and Medical Leave, and chose to resign. **In re Lennane, 483.**

SCHEDULE FOR HEARING APPEALS DURING 2022

NORTH CAROLINA SUPREME COURT

Appeals will be called for hearing on the following dates, which are subject to change.

January 5, 6
February 14, 15, 16, 17
March 21, 22, 23, 24
May 9, 10, 11, 23, 24, 25, 26
August 29, 30, 31
September 1, 19, 20, 21, 22
October 3, 4, 5, 6

BISHOP v. BISHOP

[380 N.C. 458, 2022-NCSC-18]

JOHN EDWARD BISHOP, III
v.
SARA ELIZABETH BISHOP

No. 65A21

Filed 11 March 2022

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 275 N.C. App. 457, 853 S.E.2d 815 (2020), affirming an order entered on 30 April 2018 and an order entered on 27 November 2018 by Judge Anna Worley in District Court, Wake County. Heard in the Supreme Court on 14 February 2022.

Jonathan McGirt for plaintiff-appellant.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for defendant-appellee.

PER CURIAM.

AFFIRMED.

Justice BERGER did not participate in the consideration or decision of this case.

BUTTON v. LEVEL FOUR ORTHOTICS & PROSTHETICS, INC.

[380 N.C. 459, 2022-NCSC-19]

JAMES C. BUTTON
v.
LEVEL FOUR ORTHOTICS & PROSTHETICS, INC., LEVEL FOUR SBIC HOLDINGS, LLC, PENTA MEZZANINE SBIC FUND I, L.P., REBECCA R. IRISH, AND SETH D. ELLIS

No. 376A20

Filed 11 March 2022

1. Appeal and Error—interlocutory order—claims dismissed without prejudice—no substantial right

In an action for declaratory judgment and tortious interference with contract, which was designated a complex business case, plaintiff's cross-appeal from an interlocutory order partially granting defendants' motion to dismiss was dismissed as premature. The order did not affect a substantial right to avoid the risk of inconsistent verdicts in two possible trials where plaintiff's claims were dismissed without prejudice and, therefore, not all relief had been denied.

2. Declaratory Judgments—jurisdiction—actual controversy—former CEO's contractual rights upon termination of employment

In a complex business case, where a corporation's former CEO sought a declaratory judgment setting forth his rights under his employment agreement with the corporation and under various related contracts with the corporation's majority shareholder—and where the determinative issue was whether the corporation terminated his employment with or without cause—the trial court lacked subject matter jurisdiction over the CEO's declaratory judgment claim against the majority shareholder. The complaint failed to show an actual controversy between the parties that was practically certain to result in litigation, where the decision to terminate the CEO lay with the corporation, the complaint did not allege that the CEO or the majority shareholder had attempted to exercise their rights under the various contracts, and it was impossible to speculate on appeal whether any future acts by the shareholder would constitute a breach.

3. Contracts—tortious interference with contract—specific pleading requirements—no rebuttal to qualified privilege

In a complex business case, where a corporation's former CEO (plaintiff) accused two shareholders and the minority shareholder's managing partner (defendants) of inducing the corporation to

violate plaintiff's employment agreement, the trial court properly dismissed plaintiff's claim for tortious interference with contract for failure to state a claim. Plaintiff did not comply with the specific pleading requirements for tortious interference claims where his complaint made conclusory, general allegations that defendants had acted with malice. Further, the complaint failed to rebut the presumption that the shareholders—as corporate "non-outsiders"—acted in the corporation's best interest, and also failed to rebut the qualified privilege afforded to stockholders to interfere with a corporation's contracts with third parties.

4. Jurisdiction—personal—long-arm statute—due process—CEO's contractual rights after termination—extent of control by shareholders

In a complex business case, where the parties disputed a former CEO's rights under his employment agreement with a North Carolina corporation and under various related contracts with the corporation's majority shareholder (a Florida company), and where the CEO accused the Florida company and the minority shareholder's managing partner of inducing the corporation to terminate the CEO for cause, the trial court properly exercised personal jurisdiction over the Florida company and the managing partner. To varying degrees, the Florida company—through one of its managers, who also acted as the North Carolina corporation's sole director—and the managing partner exercised control over the North Carolina corporation and were actively involved in negotiating terms of the contracts at issue and in firing the CEO, thereby satisfying the "substantial activity" requirement under North Carolina's long-arm statute and the "minimum contacts" requirement for due process.

Justice EARLS concurring in part and dissenting in part.

Justices HUDSON and ERVIN join in this opinion concurring in part and dissenting in part.

Appeal by defendants pursuant to N.C.G.S. § 1-277(b) and cross-appeal by plaintiff pursuant to N.C.G.S. § 7A-27(a)(3)(a) from an order entered 13 March 2020 in the North Carolina Business Court, Forsyth County by Judge Michael L Robinson. Heard in the Supreme Court 6 October 2021.

Mullins Duncan Harrell & Russell PLLC, by Alan W. Duncan, Stephen M. Russell, Jr., and Tyler D. Nullmeyer, for plaintiff.

Robinson, Bradshaw & Hinson, P.A., by Brian L. Church and David C. Wright, III, for defendants.

BERGER, Justice.

¶ 1 On March 13, 2020, the trial court entered an order dismissing without prejudice plaintiff James Button's claims for declaratory judgment against Level Four SBIC Holdings (Level Four Holdings). In addition, the trial court dismissed plaintiff's claim for tortious interference with contract against Penta Mezzanine SBIC Fund I, L.P. (Penta Fund), Level Four Holdings, and Seth Ellis. The trial court also denied motions to dismiss for lack of personal jurisdiction by Level Four Holdings and Ellis. Level Four Holdings and Ellis filed a notice of appeal as to the trial court's denial of their motions to dismiss for lack of personal jurisdiction. Plaintiff filed a notice of cross-appeal from the trial court's order partially granting defendants' motions to dismiss. Plaintiff acknowledged that the order from which he was attempting to appeal was interlocutory, but he argues that the appeal affects a substantial right. Alternatively, plaintiff filed a petition for writ of certiorari, arguing that this Court should allow review of the trial court's dismissal without prejudice of his claims for declaratory judgment and for tortious interference with contract.

I. Factual and Procedural Background

¶ 2 Penta Fund is a limited partnership formed in Delaware with its principal place of business in Winter Park, Florida. Penta Fund is a manager and majority owner of Level Four Holdings and minority shareholder of Level Four Orthotics & Prosthetics, Inc. (Level Four Inc.). Level Four Holdings, a Florida corporation with its principal place of business in Winter Park, Florida, is the majority shareholder of Level Four Inc., a North Carolina corporation with its principal place of business in Winston-Salem, North Carolina.

¶ 3 In July 2017, plaintiff, a citizen of New Jersey, entered into an employment agreement (the Employment Agreement) with Level Four Inc. to serve as its Chief Executive Officer. Plaintiff negotiated the terms of his employment with Rebecca Irish (Irish) and Ellis, both of whom are residents of Florida. During these negotiations, Irish "simultaneously represented Level Four Inc., Level Four Holdings, and Penta Fund." At all times relevant to the current dispute, Irish concurrently acted as "the

sole director of Level Four Inc., a manager of Level Four Holdings, and a managing partner and investment committee member of Penta Fund." Ellis was the managing partner of Penta Fund and a member on its investment committee.

¶ 4 In addition to the Employment Agreement, plaintiff entered into a Warrant Agreement with Level Four Inc. Further, with Level Four Holdings, plaintiff entered into an Option Agreement, Stock Repurchase Agreement, Go Shop Provision with Future Sale Agreement (Go Shop Agreement), and Shareholder Voting Agreement (collectively, the Level Four Holdings Agreements).

A. The Employment Agreement and Warrant Agreement with Level Four Inc.

¶ 5 The Employment Agreement allowed Level Four Inc. to terminate plaintiff's employment with or without cause. Termination without cause entitled plaintiff to a thirty-day written notice along with several severance benefits. If terminated for cause, plaintiff would not be entitled to notice or severance benefits. Pursuant to the Employment Agreement, termination for cause was permissible for "any willful misconduct or gross negligence which could reasonably be expected to have a material adverse affect [sic] on the business and affairs of [Level Four Inc.]." "Willful misconduct" under the agreement was defined as conduct that a court determines "to be knowingly fraudulent or deliberately dishonest." Additionally, during employment negotiations, plaintiff learned of and became concerned with the amount of debt Level Four Inc. owed to Penta Fund. As a result, plaintiff negotiated for a clause to be included in the Employment Agreement whereby the interest rates on promissory notes payable to Penta Fund by Level Four Inc. would "be reduced to no greater than the two- and one-half percent (2.5%) at all times subsequent to July 1, 201[7]."

¶ 6 Under the Warrant Agreement, plaintiff had the right to purchase 30% of Level Four Inc.'s common stock, subject to certain vesting requirements. Notably, plaintiff's rights under the Warrant Agreement would fully vest without regard to the duration of his employment if his employment was terminated without cause. However, if plaintiff's employment was terminated for cause, no further rights under the Warrant Agreement would vest.

B. The Level Four Holdings Agreements

¶ 7 Pursuant to the Option Agreement, plaintiff had the right to purchase 21% of Level Four Inc.'s common stock, along with over $3 million worth

of notes plus accrued interest owed to Penta Fund by Level Four Inc. Plaintiff's voluntary resignation or termination for cause would eliminate his right to exercise the option contained in the Option Agreement. Otherwise, a termination without cause would allow plaintiff's rights under the Option Agreement to continue until they naturally expired.

¶ 8 The Stock Repurchase Agreement concerned what rights Level Four Holdings had regarding stock obtained by plaintiff pursuant to the Warrant Agreement and Option Agreement. If plaintiff's employment was terminated without cause, Level Four Holdings would not have the ability to purchase stock acquired by plaintiff under the Option Agreement but would be allowed to purchase stock acquired by plaintiff under the Warrant Agreement. Alternatively, if plaintiff's employment was terminated for cause, Level Four Holdings would have the option to purchase stock acquired by plaintiff under both the Option Agreement and Warrant Agreement.

¶ 9 Finally, under the Go Shop Agreement, plaintiff was given the right to submit a competing offer to purchase Level Four Inc. within a thirty-day period should Level Four Holdings agree to an offer to sell Level Four Inc. to a third party. Plaintiff's termination for cause or voluntary resignation would immediately terminate these rights. If plaintiff's employment was terminated without cause, however, his rights under the Go Shop Agreement would continue for six months from the date of his "without cause" termination.

C. Plaintiff's employment and subsequent termination

¶ 10 Upon plaintiff's employment as CEO, Level Four Inc. owed Penta Fund close to $10 million in long-term debt bearing various interest rates of up to 18%. Pursuant to the Employment Agreement, however, the interest rate on the debt owed by Level Four Inc. was reduced to 2.5%. In November 2018, plaintiff sought an additional loan from Penta Fund. On December 12, 2018, Irish conditioned the additional funding with an 8% interest rate applicable to both new and existing amounts owed to Penta Fund. Plaintiff refused to agree to any modification regarding the interest rate provision in the Employment Agreement and believed implementation of an 8% interest would violate the Employment Agreement.

¶ 11 Despite plaintiff's objection to increasing the interest, Penta Fund wired funds to Level Four Inc. on December 12, 2018. On that day, as well as on February 21, 2019, Irish and Ellis presented to plaintiff promissory notes with an interest rate of 8%, and plaintiff refused to sign the notes. On a February 21, 2019, conference call, Ellis informed plaintiff that the promissory note needed to be signed.

¶ 12 Plaintiff traveled to North Carolina on March 20, 2019, to meet with employees and attend various meetings. One of the meetings included a conference call with Penta Fund's Investment Committee. During this call, plaintiff was given an opportunity to resign. When he refused, plaintiff was informed by Irish that his employment with Level Four Inc. was being terminated for cause. Plaintiff contends he has not been provided with a reason for his termination, specifically regarding the classification as for cause. Upon termination of plaintiff's employment, Irish was appointed CEO of Level Four Inc.

¶ 13 On May 30, 2019, plaintiff filed a complaint in this matter, and the case was designated as a complex business case. Plaintiff sought, among other things, a declaratory judgment setting forth his specific rights under the Employment Agreement and Level Four Holdings Agreements. Plaintiff also alleged claims for tortious interference with contract against Penta Fund, Ellis, Level Four Holdings, and Irish. Defendants moved to dismiss all claims against Level Four Holdings and Ellis for lack of personal jurisdiction.

¶ 14 On March 13, 2020, the trial court determined that it did not have subject matter jurisdiction over plaintiff's declaratory judgment claim because no actual controversy existed and dismissed that claim against Level Four Holdings without prejudice under Rule 12(b)(1). The trial court also dismissed without prejudice plaintiff's claims for tortious interference with contract against Penta Fund, Level Four Holdings, and Ellis pursuant to Rule 12(b)(6). The trial court determined that plaintiff's allegations of malice were insufficiently pled in the complaint. Further, the trial court denied defendant's motion to dismiss for lack of personal jurisdiction over Level Four Holdings and Ellis. Plaintiff and defendants cross-appeal, both arguing the trial court erred in making the above rulings.

¶ 15 **[1]** The initial question we must address is whether plaintiff's appeal is properly before this Court. An order is either "interlocutory or the final determination of the rights of the parties." N.C.G.S. § 1A-1, Rule 54(a) (2021). Interlocutory orders are generally not immediately appealable. N.C.G.S. § 7A-27 (2021). However, interlocutory orders from the Business Court may be appealed to this Court if the order affects a substantial right. N.C.G.S. § 7A-27(a)(3)(a). "Ordinarily, an appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (quoting *Stanback v. Stanback*, 287 N.C. 448, 453, 215 S.E.2d 30, 34 (1975)).

¶ 16 Plaintiff argues that dismissal of his declaratory judgment action and claim for tortious interference with contract affect a substantial right because of the possibility of inconsistent verdicts. *See Cook v. Bankers Life & Cas. Co.*, 329 N.C. 488, 491, 406 S.E.2d 848, 850 (1991). Plaintiff contends that similar factual issues must be resolved with regard to the classification of his termination and determination of whether defendants acted with malice. Failure to resolve these issues now, plaintiff argues, would potentially require these similar factual issues to be determined at separate trials.

¶ 17 Plaintiff's argument, however, fails to appreciate that the dismissal of his claims was without prejudice. As not all relief has been denied, it follows that no substantial right has been affected and plaintiff's appeal is premature. *See Day v. Coffey*, 68 N.C. App. 509, 510, 315 S.E.2d 96, 97 (1984) ("When the court allows amendment, relief in the trial court has not been entirely denied and appeal is premature. . . . Plaintiffs have an opportunity to correct the deficiency in the trial court without affecting their cause of action. Prosecuting an appeal, when simple and economical corrective measures might be taken without prejudice in the trial court, is exactly the sort of wasteful procedure which our appellate courts have consistently disapproved."). Because no substantial right has been affected, plaintiff's interlocutory cross-appeal is improper and defendant's motion to dismiss plaintiff's cross-appeal is allowed.

¶ 18 Plaintiff alternatively petitions this Court pursuant to Rule 21 of the Rules of Appellate Procedure for a writ of certiorari to review the trial court's dismissal of his declaratory judgment action and claim for tortious interference with contract. A

> writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief.

N.C. R. App. P. 21.

¶ 19 A writ of certiorari is intended "as an extraordinary remedial writ to correct errors of law." *State v. Simmington*, 235 N.C. 612, 613, 70 S.E.2d 842, 843–44 (1952). A petitioner "must show 'merit or that error was probably committed below[.]' " *State v. Ricks*, 2021-NCSC-116, ¶ 6, 378 N.C. 737, 741 (quoting *State v. Grundler*, 251 N.C. 177, 189, 111

S.E.2d 1, 9 (1959)); *See also In re Snelgrove*, 208 N.C. 670, 182 S.E. 335, 336 (1935) ("Certiorari is a discretionary writ, to be issued only for good or sufficient cause shown, and the party seeking it is required . . . to show merit or that he has reasonable grounds for asking that the case be brought up and reviewed on appeal.").

¶ 20 For the reasons stated below, plaintiff has failed to show that his petition has merit or that error was probably committed by the Business Court, and we deny his petition for writ of certiorari.

II. Analysis

A. Plaintiff's declaratory judgment claim against Level Four Holdings

¶ 21 **[2]** A court shall dismiss an action when it appears that the court lacks subject matter jurisdiction. N.C.G.S. § 1A-1, Rule 12(h)(3) (2019). As a jurisdictional prerequisite, the Declaratory Judgment Act requires "the pleadings and evidence [to] disclose the existence of an actual controversy between the parties having adverse interests in the matter in dispute." *Gaston Bd. of Realtors v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 61 (1984). This controversy between the parties must exist "at the time the pleading requesting declaratory relief [was] filed." *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 583, 347 S.E.2d 25, 29 (1986). Absolute certainty of litigation is not required, but the plaintiff must demonstrate "to a practical certainty" that litigation will arise. *Ferrell v. Dep't of Transp.*, 334 N.C. 650, 656, 435 S.E.2d 309, 314 (1993).

¶ 22 Plaintiff in the present case seeks a decision concerning his rights under the Employment Agreement and the collective Level Four Holdings Agreements. Essentially, plaintiff requests a determination as to whether his termination from Level Four Inc. was with or without cause. Plaintiff's rights under the various agreements differ significantly based on this classification.

¶ 23 Pursuant to the Employment Agreement, determination of whether to terminate plaintiff's employment was a decision to be made by Level Four Inc., not Level Four Holdings. Thus, any actual controversy and subsequent litigation regarding the classification would be directed toward Level Four Inc. Plaintiff's complaint does not establish the existence of an actual controversy between himself and Level Four Holdings that is practically certain to result in litigation.

¶ 24 Regarding the Level Four Holdings Agreements, plaintiff's complaint does not establish his intent or ability to exercise his rights under the Option Agreement, an attempt by Level Four Holdings to exercise

its rights under the Stock Repurchase Agreement, or that a contemplated sale will trigger any rights under the Go Shop Agreement. Although one can imagine scenarios from which litigation could arise under such agreements, litigation cannot be a practical certainty in the absence of a party attempting to exercise rights under the various agreements.

¶ 25 Plaintiff's argument is couched in the notion that Level Four Holdings may breach the various agreements at some future date. However, whether any future act would constitute a breach is dependent on whether plaintiff's employment was terminated for cause. With that issue still pending before the trial court, this Court is unable to speculate as to what rights either party has and what future acts would constitute a breach. Plaintiff's argument is insufficient to establish an actual controversy between himself and Level Four Holdings to satisfy the jurisdictional requirement of the Declaratory Judgment Act. *See Gaston Bd. of Realtors*, 311 N.C. at 234, 316 S.E.2d at 61.

¶ 26 As such, plaintiff has failed to demonstrate that his petition has merit or that the trial court committed error in dismissing his claim for declaratory judgment as to Level Four Holdings.

B. Tortious interference with contract

¶ 27 **[3]** "A complaint should not be dismissed under Rule 12(b)(6) unless it affirmatively appears that the plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim." *Embree Const. Grp., Inc. v. Rafcor, Inc.*, 330 N.C. 487, 491, 411 S.E.2d 916, 920 (1992) (cleaned up). Practically, "the system of notice pleading affords a sufficiently liberal construction of complaints so that few fail to survive a motion to dismiss." *Id.* (cleaned up).

¶ 28 To establish a claim for tortious interference, the complaint must allege: (1) a valid contract existed between the plaintiff and a third person conferring contractual rights to plaintiff against a third person; (2) defendant knew of the contract; (3) the defendant intentionally induced the third person not to perform the contract; (4) in not performing the contract the third person acted without justification; and (5) plaintiff suffered actual damages. *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988). The issue before us concerns the fourth element.

¶ 29 Corporate "non-outsiders" have a qualified privilege leading to a presumption that he or she acted in the corporation's best interest. *See Embree*, 330 N.C. at 498, 411 S.E.2d at 924 (discussing the privilege available to corporate insiders). "A non-outsider is one who, though not

a party to the terminated contract, had a legitimate business interest of his own in the subject matter." *Smith v. Ford Motor Co.*, 289 N.C. 71, 87, 221 S.E.2d 282, 292 (1976). Non-outsiders include officers, directors, shareholders, and other corporate fiduciaries. *Embree*, 330 N.C. at 498, 411 S.E.2d at 924.

¶ 30 A non-outsider's actions, then, are presumed justified, and the presumption can only be overcome by a showing that the non-outsider acted with malice. *Ford Motor Co.*, 289 N.C. at 87—88, 91, 221 S.E.2d at 292, 294. Essentially, the claimant "must allege facts demonstrating that [the] defendant's actions were not prompted by legitimate business purposes." *Embree*, 330 N.C. at 500, 411 S.E.2d at 926 (cleaned up). "General allegations which characterize defendant's conduct as malicious are insufficient as a matter of pleading." *Spartan Equip. Co. v. Air Placement Equip. Co.*, 263 N.C. 549, 559, 140 S.E.2d 3, 11 (1965). Further, "[i]n order to survive dismissal, a complaint alleging tortious interference must admit of no motive for interference other than malice." *Wells Fargo Ins. Servs. USA, Inc. v. Link*, 372 N.C. 260, 285, 827 S.E.2d 458, 477 (2019) (cleaned up).

¶ 31 Penta Fund and Level Four Holdings are shareholders of Level Four Inc. Thus, Penta Fund and Level Four Holdings are considered non-outsiders and are entitled to a presumption that their actions were "prompted by legitimate business purposes" and in the best interest of Level Four Inc. *Embree*, 330 N.C. at 500, 411 S.E.2d at 926. To rebut this presumption, plaintiff must allege that Penta Fund and Level Four Holdings acted in their own personal interest. Further, his complaint "must admit of no motive for interference other than malice." *Link*, 371 N.C. at 285, 827 S.E.2d at 477.

¶ 32 Plaintiff's complaint states that Penta Fund and Level Four Holdings "intentionally induced Level Four Inc. not to comply with the Employment Agreement by classifying [plaintiff's] termination as 'for cause' in violation of the Employment Agreement and without justification." Such "willful interference," plaintiff alleges "was carried out to benefit themselves regardless of the negative repercussions on Level Four Inc." However, in the section of plaintiff's complaint alleging tortious interference, plaintiff fails to distinguish between the defendants and allege with specificity how each acted in their own personal interest. We are not permitted to infer a personal interest upon which Penta Fund and Level Four Holdings acted from the allegations in the complaint.

¶ 33 Further, this Court has concluded that a stockholder's financial interest in a corporation allows for "a qualified privilege to interfere with contractual relations between the corporation and a third party."

Wilson v. McClenny, 262 N.C. 121, 133, 136 S.E.2d 569, 578 (1964). Plaintiff's conclusory allegation does little to comply with the specific pleading requirements of a tortious interference claim that prohibit general allegations of malice, *Spartan*, 263 N.C. at 559, 140 S.E.2d at 11, and fails to rebut the qualified privilege afforded to Penta Fund and Level Four Holdings as non-outsiders, *Embree*, 330 N.C. at 500, 411 S.E.2d at 926, and stockholders. *Wilson*, 262 N.C. at 133, 136 S.E.2d at 578.

¶ 34 Regarding Ellis, whether he constituted a non-outsider is not dispositive. Plaintiff, again, makes only general allegations of malice which "are insufficient as a matter of pleading." *Spartan*, 263 N.C. at 559, 140 S.E.2d at 11. Plaintiff's complaint again fails to adhere to the strict pleading requirements when alleging tortious interference against Penta Fund, Level Four Holdings, and Ellis. As such, plaintiff's petition lacks merit and has failed to show error in the trial court's dismissal of his claims for tortious interference against Penta Fund, Level Four Holdings, and Ellis.

C. Personal jurisdiction over Level Four Holdings and Ellis

¶ 35 **[4]** "The standard of review of an order determining [personal] jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Tejal Vyas, LLC v. Carriage Park, L.P.*, 166 N.C. App. 34, 37, 600 S.E. 2d 881, 884 (2004), *per curiam affirmed*, 359 N.C. 315, 608 S.E.2d 751 (2005). "Where no findings are made, proper findings are presumed, and our role on appeal is to review the record for competent evidence to support these presumed findings." *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 217–18, *appeal dismissed and disc. review denied*, 353 N.C. 261, 546 S.E.2d 90 (2000). "If presumed findings of fact are supported by competent evidence, they are conclusive on appeal despite evidence to the contrary." *Tejal*, 166 N.C. App. at 37, 600 S.E.2d at 884.

¶ 36 Appellate courts consider the same evidence as the trial court when determining whether competent evidence exists to support the exercise of personal jurisdiction which includes: (1) any allegations in the complaint that are not controverted by the defendants' affidavits; (2) all facts in the affidavits; and (3) any other evidence properly tendered. *Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 694, 611 S.E.2d 179, 183 (2005); *Parker v. Town of Erwin*, 243 N.C. App. 84, 98, 776 S.E.2d 710, 722 (2015).

¶ 37 This Court engages in a two-step analysis when examining whether our courts can exercise personal jurisdiction over a non-resident defendant. *Beem USA Ltd.-Liab. Ltd. P'ship v. Grax Consulting LLC*, 373

N.C. 297, 302, 838 S.E.2d 158, 161 (2020). First, personal jurisdiction must be permitted by North Carolina's long-arm statute which allows a court to exercise jurisdiction over a defendant who "[i]s engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise." N.C.G.S. § 1-75.4(1)(d) (2019). "This Court has held that this statute is 'intended to make available to the North Carolina courts the full jurisdictional powers permissible under federal due process.' " *Beem*, 373 N.C. at 302, 838 S.E.2d at 161 (quoting *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 676, 231 S.E.2d 629, 630 (1977)). Second, "the Due Process Clause permits state courts to exercise personal jurisdiction over an out-of-state defendant so long as the defendant has certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* at 302, 231 S.E.2d at 162 (cleaned up).

¶ 38 Personal jurisdiction, then, cannot result from random, attenuated contacts, but instead must follow "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Skinner v. Preferred Credit*, 361 N.C. 114, 123, 638 S.E.2d 203, 210–11 (2006) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239-40 (1958)). Thus, a defendant's contacts with the forum state must be sufficient such that a defendant would "reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). There are two types of personal jurisdiction: general and specific, with the latter being at issue in this case.

¶ 39 Specific jurisdiction "encompasses cases in which the suit arises out of or relates to the defendant's contacts with the forum." *Beem*, 373 N.C. at 303, 231 S.E.2d at 162 (cleaned up). Specific jurisdiction, "is, at its core, focused on the relationship among the defendant, the forum, and the litigation." *Id.* (cleaned up). A defendant's physical presence in the forum state is not a prerequisite to jurisdiction. *Walden v. Fiore*, 571 U.S. 277, 283 (2014). While a contractual relationship between an out-of-state defendant and a North Carolina resident is not dispositive of whether minimum contacts exist, "a single contract may be a sufficient basis for the exercise of [specific personal] jurisdiction if it has a substantial connection with this State." *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 367, 348 S.E.2d 782, 786 (1986). Finally, each defendant's contacts with the forum state must be analyzed individually. *Calder v. Jones*, 465 U.S. 783, 790 (1984).

¶ 40 Beginning with North Carolina's long-arm statute, the record makes clear that both Level Four Holdings and Ellis are "engaged in substantial

activity within [North Carolina]," and it is irrelevant "whether such activity is wholly interstate, intrastate, or otherwise." N.C.G.S. § 1-75.4(1)(d). As further discussed below, a review of the record establishes the control over Level Four Inc., a North Carolina entity, that was exercised by Level Four Holdings and Ellis, and the exercise of personal jurisdiction over Level Four Holdings and Ellis complies with North Carolina's long-arm statute. We now analyze both defendants' contacts individually to ensure that maintenance of the suit "does not offend traditional notions of fair play and substantial justice." *Beem*, 373 N.C. at 302, 838 S.E.2d at 161 (cleaned up).

¶ 41 The trial court's order set forth the "factual allegations that [were] relevant and necessary to the [trial court's] determination" including, that each of the Level Four Holdings Agreements defined "Corporation" as Level Four Inc. and selected North Carolina in the choice of law provisions; Irish acted simultaneously as the sole director of Level Four Inc., a manager of Level Four Holdings, and a managing partner and investment committee member of Penta Fund without ever differentiating the entity she was representing; Irish was actively involved in the management of Level Four Inc. and plaintiff's termination; Level Four Inc.'s "corporate central functions" were in North Carolina; and plaintiff regularly conducted business in North Carolina as CEO of Level Four Inc.

¶ 42 The trial court stated that these factual allegations "tend[ed] to show that Level Four Holdings contemplated continuing obligations with [p]laintiff and Level Four Inc., [p]laintiff regularly performed work pertaining to the Employment Agreement in North Carolina, and the Employment Agreement and Level Four Holdings Agreements have a substantial connection with North Carolina." "These facts," said the trial court, "support a conclusion that the [c]ourt may properly exercise personal jurisdiction over Level Four Holdings."

¶ 43 Aside from the contractual relationship that existed, the trial court noted the actions of Level Four Holdings, through Irish, such as: negotiating the reduced interest rate of debt owed to Penta Fund by Level Four Inc.; terminating plaintiff's employment with Level Four Inc. while physically present in North Carolina; and increasing the interest rate on debt owed by Level Four Inc. to Penta Fund. This additional conduct, the trial court noted, "further supports the conclusion that the [c]ourt may properly exercise personal jurisdiction over Level Four Holdings."

¶ 44 Although not designated as findings of fact in the trial court's order, the factual allegations relied upon by the trial court do support its conclusion that personal jurisdiction is proper over Level Four Holdings.

Additionally, though not discussed in the trial court's order, evidence contained in the record—including the uncontroverted allegations in the complaint, facts contained in the affidavits, and other properly admitted evidence—permits this Court to presume the trial court could have found the following: Level Four Holdings is the majority shareholder of Level Four Inc., a North Carolina entity; included in the Insurance section of the Employment Agreement is a requirement that Level Four Inc. or Penta Fund maintain insurance against liability on behalf of plaintiff so long as Level Four Holdings owned Level Four Inc. stock; and the Employment Agreement stated that Level Four Holdings and plaintiff would discuss relocating other Level Four Inc. executive offices to New Jersey pending a review of Level Four Inc.'s personnel and costs.

¶ 45 The trial court's "factual allegations" that it relied on, coupled with the additional presumed findings discussed above, are supported by competent evidence. As such, they are conclusive on appeal. *Tejal*, 166 N.C. App. at 37, 600 S.E.2d at 884, *per curiam affirmed*, 359 N.C. 315, 608 S.E.2d 751 (2005).

¶ 46 Level Four Holdings' contacts with this state are neither random nor attenuated. Rather, they are evidence of Level Four Holdings purposefully availing itself of the privilege of conducting business in North Carolina. *See Skinner*, 361 N.C. at 123, 638 S.E.2d at 210–11 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). Level Four Holdings could reasonably anticipate being haled into court in North Carolina when it selected North Carolina in the choice of law provision in the Employment Agreement and Level Four Holdings Agreements. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Moreover, Level Four Holdings could also anticipate continuing obligations with Level Four Inc. when it required Level Four Inc. to maintain specific insurance so long as Level Four Holdings owned stock in Level Four Inc., a North Carolina corporation with its principal place of business in North Carolina. Further evidence of its continuing obligation is the process by which Level Four Holdings was to discuss relocating Level Four Inc.'s executive offices away from the current location in Winston-Salem, North Carolina after an assessment of Level Four Inc.'s personnel and costs. Such involvement with and control over Level Four Inc., a North Carolina entity, by Level Four Holdings, a majority shareholder, satisfy the minimum contacts required by due process.

¶ 47 Next, regarding Ellis, a court cannot "base personal jurisdiction on the bare fact of a defendant's status as . . . a corporate officer or agent," as such "would violate his due process rights." *Saft Am., Inc. v. Plainview Batteries, Inc.*, 189 N.C. App. 579, 595, 659 S.E.2d 39, 49

(2008) (Arrowood, J., dissenting), *reversed for reasons stated in dissent*, 363 N.C. 5, 673 S.E.2d 864 (2009) (per curiam). However, it is not simply Ellis's status that the trial court relied upon in determining it could properly exercise personal jurisdiction. The trial court recited Ellis's contacts with North Carolina alleged by plaintiff, including: negotiating the terms of plaintiff's employment with Level Four Inc.; negotiating the interest-rate provision in the Employment Agreement; discussing Level Four Inc.'s performance with plaintiff on at least fifteen occasions via telephone or e-mail; informing plaintiff that his termination was a unanimous decision of Penta Fund; and increasing the interest rate on the debt owed to Penta Fund by Level Four Inc. The trial court found that Ellis's contacts with North Carolina "establish [ ] that Mr. Ellis purposefully availed himself of the benefits of the forum," and "go directly to [p]laintiff's management of Level Four Inc. and the termination of his employment, which is the core of the subject matter of this litigation." As a result, the trial court concluded that it could properly exercise personal jurisdiction over Ellis.

¶ 48 Again, the record contains competent evidence to support the factual allegations relied on by the trial court, and they are conclusive on appeal. *Tejal*, 166 N.C. App. at 37, 600 S.E.2d at 884, *per curiam affirmed*, 359 N.C. 315, 608 S.E.2d 751 (2005). It is these acts by Ellis that plaintiff claims violated the Employment Agreement and for which Ellis could "reasonably anticipate being haled into court" in North Carolina. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Similar to Level Four Holdings, the record contains competent evidence of Ellis's control of Level Four Inc., a North Carolina entity. It follows that plaintiff's suit arises out of Ellis's contacts with North Carolina through his control over Level Four Inc., a North Carolina entity, and that personal jurisdiction can be properly exercised over Ellis. *See Beem*, 373 N.C. at 303, 838 S.E.2d at 162 (stating that specific jurisdiction encompasses cases in which the suit arises out of or relates to the defendant's contacts with the forum). As such, the trial court was correct in determining personal jurisdiction exists over both Level Four Holdings and Ellis.

III. Conclusion

¶ 49 For the foregoing reasons, this Court concludes plaintiff has failed to demonstrate a substantial right has been affected or that an error likely occurred at the trial court. Further, North Carolina's long arm statute, in conjunction with both Level Four Holdings's and Ellis's sufficient minimum contacts with North Carolina, allow for the trial court to exercise personal jurisdiction. In conclusion, defendants' motion to dismiss

plaintiff's notice of cross-appeal is allowed; plaintiff's petition for writ of certiorari is denied; and the decision of the trial court regarding personal jurisdiction is affirmed.

AFFIRMED.

Justice EARLS concurring in part and dissenting in part.

¶ 50 I concur in the majority's conclusion that Level Four Holdings and Ellis are subject to the trial court's personal jurisdiction. However, I write separately to explain my disagreement with how the majority disposes of Button's interlocutory appeal and petition for a writ of certiorari. In particular, I disagree with the majority's conflation of the standard for determining whether a writ of certiorari should be issued with an analysis of the ultimate merits of Button's claims. In this case, I believe our interest in judicial economy justifies issuing a writ of certiorari. On the merits, I would affirm the trial court's dismissal of Button's declaratory judgment claim against Level Four Holdings but reverse the court's dismissal of his tortious interference claims against Penta Fund, Level Four Holdings, and Seth Ellis.

I. Button's interlocutory appeal and petition for writ of certiorari

¶ 51 Button seeks interlocutory review of the trial court's dismissal of his declaratory judgment claim against Level Four Holdings and his claim for tortious interference with contract against Penta Fund, Level Four Holdings, and Ellis. Button invokes two procedural mechanisms in his effort to bring the trial court's dismissal of his claims before this Court on interlocutory review. First, he invokes N.C.G.S. § 7A-27(a)(3)(a) in arguing that the trial court's actions implicate a substantial right based on the risk of inconsistent verdicts, given that the trial court allowed his claims to proceed as against other defendants. Second, he invokes N.C.G.S. § 7A-32(b) and Rule 21 of the North Carolina Rules of Appellate Procedure in arguing that this Court should issue a writ of certiorari in the interests of judicial economy and to avoid fragmentary and piecemeal appellate review. The majority decides that neither ground provides a basis for allowing interlocutory review, dismissing Button's cross-appeal and denying his petition for writ of certiorari. Yet, curiously, the majority appears to rule on the substantive merits of both claims. In so doing, the majority reaches out to decide two issues that, by its own account, are not properly before this Court. The majority's handling of these two claims risks muddling our standard for determining when interlocutory review is appropriate.

¶ 52 For example, the majority seems to imply that interlocutory review is not warranted pursuant to N.C.G.S. § 7A-27(a)(3)(a) because "the dismissal of [Button's] claims was without prejudice." To begin with, this rationale does not address Button's actual argument; because his declaratory judgement claim and his tortious interference claim survived as against one of the defendants, Irish, the fact that his claims were dismissed without prejudice as against other defendants does not obviate the risk of inconsistent verdicts arising from two separate trials. Regardless, this rationale appears to offer cold comfort given that, just a few paragraphs later, the majority proceeds to (1) conduct a review of Button's declaratory judgment claim and conclude, on the merits, that there is no actual controversy, and (2) examine the merits of Button's tortious interference claim in significant detail.

¶ 53 Ostensibly, the majority analyzes the substance of Button's claims in the course of concluding that his writ of certiorari should be denied. The majority is correct that, in determining whether a petition for writ of certiorari should be granted or denied, an appellate court must assess whether the claim has "merit," as we recently noted in *State v. Ricks*. 378 N.C. 737, 2021-NCSC-116, ¶ 1 ("[A]n appellate court may only consider certiorari when the petition shows merit, meaning that the trial court probably committed error at the hearing."). But a determination as to whether a petition for writ of certiorari should be granted is prior to and distinct from a resolution of the ultimate merits of a claim—a court must issue a writ of certiorari "in order to *reach* the merits" of a claim. *In re A.C.*, 378 N.C. 377, 2021-NCSC-91, ¶ 7 n.3 (emphasis added). Thus, at this stage, the question is whether "there is merit to an appellant's substantive arguments" such that certiorari should be granted and the merits reached, not whether the appellant's substantive arguments will ultimately succeed. *Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 606 (2004).

¶ 54 It cannot be and has never been the case that a litigant must prevail on the merits in order to demonstrate that a writ of certiorari should be issued. *See id.* at 606, 610 (2004) (exercising discretion under Rule 21 to grant certiorari "to consider the full merits of this appeal" but concluding with respect to one issue that "the trial court did not abuse its discretion"). More importantly, it cannot be and has never been the case that a litigant who has failed to demonstrate that certiorari is warranted necessarily must lose when their substantive claim is resolved in due course. *See, e.g.*, *Peaseley v. Virginia Iron, Coal & Coke Co.*, 282 N.C. 585, 595 (1973) ("[D]enials of [c]ertiorari do not constitute approval of either the reasoning or the merits of the prior decisions of the [lower

tribunal].”). Certiorari is, as the majority notes, “an extraordinary remedial writ.” Not every litigant who fails to demonstrate that his or her case is “extraordinary” must fail when the merits of his or her claim are ultimately resolved.

¶ 55 Because the Court in this case has dismissed Button’s cross-appeal and denied certiorari, its substantive analysis of Button’s declaratory judgment and tortious interference with contract claims must be understood as nothing more than an illustrative examination of their “merit” relevant solely for the purposes of justifying the majority’s decision to deny certiorari and not for any other purpose. The majority does not—and, in accordance with its own ruling that these claims are not before this Court, cannot—conclusively resolve the issues of whether Button has properly stated a claim under the Declaratory Judgment Act or for tortious interference with contract. Any attempt to resolve an issue not presently before the Court “would constitute an advisory opinion on abstract questions, and this court will not give advisory opinions or decide abstract questions.” *Kirkman v. Wilson*, 328 N.C. 309, 312 (1991) (cleaned up). Still, the majority’s imprecision risks conflating two distinct analyses and preempting any effort Button may choose to undertake to amend his complaint regarding claims that have been dismissed without prejudice. A party need not prove their case in order to obtain a writ of certiorari, and an appellate court’s refusal to issue the writ on an interlocutory appeal does not dictate the outcome on the merits in future proceedings.

¶ 56 In addition to my concerns about the majority’s analytical approach, I also depart from the majority’s decision not to grant certiorari and reach the merits of Button’s declaratory judgment and tortious interference claims. Under Appellate Rule 21, this Court may issue the writ of certiorari “in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals . . . when no right of appeal from an interlocutory order exists.” N.C. R. App. P. 21(a)(1). Our Rules of Appellate Procedure aim to promote the efficient disposition of appeals, and we have previously issued the writ in order to “prevent fragmentary and partial appeals.” *Pelican Watch v. U.S. Fire Ins. Co.*, 323 N.C. 700, 702 (1989). As the Court of Appeals has explained, while reviewing interlocutory orders is ordinarily inefficient, there exist “exceptional cases where judicial economy will be served by” issuing a writ of certiorari and “consider[ing] the order [of a lower tribunal] on its merits.” *Carolina Bank v. Chatham Station, Inc.*, 186 N.C. App. 424, 428 (2007); *see also Valentine v. Solosko*, 270 N.C. App. 812, 814, *review denied*, 376 N.C. 537 (2020) (issuing writ in the interest of “judicial economy”).

¶ 57 Three aspects of Button's case lead me to the conclusion that his appeal presents one of those "exceptional case[s]" where issuing a writ of certiorari and conclusively resolving the merits of the defendants' motions to dismiss serves our interest in judicial economy. First, because this Court did not previously rule on Button's cross-appeal and petition for writ of certiorari, the merits of Button's declaratory judgment and tortious interference claims have been fully briefed and argued at this Court. Second, because the trial court ruled that Button could proceed on his declaratory judgment and tortious interference claims as against other defendants, resolving the legal issues surrounding these claims now would likely serve "the interests of judicial economy." *Robinson, Bradshaw & Hinson, P.A. v. Smith*, 139 N.C. App. 1, 9 (2000). Because issues that may be decisive in determining the ultimate merits of Button's surviving claims are presently before us, denying certiorari in this case "encourage[s] rather than prevent[s] fragmentary and partial appeals." *Pelican Watch*, 323 N.C. at 702. Third, the case is already before us on defendants' appeal as of right on the question of personal jurisdiction. Under these circumstances, I believe Button's claims have sufficient merit to justify us exercising our authority to accept review and offer a conclusive resolution of the legal issues presented.

II. Button's declaratory judgment and tortious interference claims

¶ 58 Turning to the merits, I largely agree with the majority's analysis and would hold that Button has failed to state a cognizable claim arising under the Declaratory Judgment Act. In his complaint, Button does not allege that he has attempted to exercise any of the rights afforded to him under the Option Agreement, nor that he imminently intends to do so or that any of the defendants have exercised or intend to exercise any of their rights based upon their contention that the Employment Agreement was terminated for cause. It is certainly possible that litigation *may* arise should any of these events come to pass but, as the majority correctly notes, Button has failed to demonstrate "to a practical certainty" that litigation is imminent. *Sharpe v. Park Newspapers* of Lumberton, Inc., 317 N.C. 579, 590 (1986); *see also Chapel H.O.M. Assocs., LLC v. RME Mgmt., LLC*, 256 N.C. App. 625, 629–30 (2017) ("To satisfy the jurisdictional requirement of an actual controversy, it must be shown in the complaint that litigation appears unavoidable. Mere apprehension or the mere threat of an action or suit is not enough."). Accordingly, on the merits, I would affirm the trial court's dismissal of this claim.

¶ 59 However, I disagree with the majority's analysis of Button's tortious interference claim and would conclude that he has stated a claim for

tortious interference against Penta Fund, Level Four Holdings, and Ellis. Although the majority correctly recites the elements of a tortious interference claim involving corporate non-outsiders, the majority suggests an unduly stringent standard inconsistent with notice pleading principles. The majority also ignores numerous relevant factual allegations contained in Button's complaint.

¶ 60 It is a longstanding principle in North Carolina that potentially meritorious claims should generally be resolved on the merits, not dismissed on technical grounds. *See generally*, *e.g.*, *Hansley v. Jamesville & W.R. Co.*, 117 N.C. 565 (1895) (describing "our system of liberal pleading"). "[T]he spirit of the North Carolina Rules of Civil Procedure is to permit parties to proceed on the merits without the strict and technical pleadings rules of the past." *Henry v. Deen*, 310 N.C. 75, 82 (1984). Of course, a complaint must "allege[ ] the substantive elements of a legally recognized claim and . . . give[ ] sufficient notice of the events that produced the claim to enable the adverse party to prepare for trial." *Embree Const. Grp., Inc. v. Rafcor, Inc.*, 330 N.C. 487, 490–91 (1992). But "[a] complaint should not be dismissed under Rule 12(b)(6) . . . unless it affirmatively appears that plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim." *Ladd v. Est. of Kellenberger*, 314 N.C. 477, 481 (1985).

¶ 61 To survive a motion to dismiss, a complaint asserting tortious interference by a corporate non-outsider must allege that the defendant acted without justification. As the majority correctly notes, corporate non-outsiders are "entitled to a presumption that their actions 'were prompted by legitimate business purposes.' " Because corporate non-outsiders are presumed to act in the company's interests, they are afforded a "conditional or qualified" "privilege" to interfere with a contractual obligation assumed by the company. *Smith v. Ford Motor Co.*, 289 N.C. 71, 91 (1976). A complaint asserting tortious interference against corporate non-outsiders must allege "malice" to displace this privilege. *Wells Fargo Ins. Servs. USA, Inc. v. Link*, 372 N.C. 260, 285 (2019). Nonetheless, the majority goes too far in suggesting that "strict pleading requirements" apply in this context; rather, the "rule of liberal construction of complaints" still applies to a complaint alleging tortious interference by a corporate non-outsider. *Embree Const. Grp.*, 330 N.C. at 500.[1] The complaint need not affirmatively disprove the possibility

1. The sole case the majority appears to rely on in support of its assertion that "strict pleading requirements" apply to tortious interference claims is *Spartan Equip. Co. v. Air Placement Equip. Co.*, a case which both predates adoption of the North Carolina Rules of Civil Procedure and states nothing more than that "general allegations" of malice

that the corporate non-outsiders did act in the interests of the company. Rather, the complaint need only "allege facts demonstrating that defendants' actions were not prompted by 'legitimate business purposes.' " *Id.*

¶ 62 In the section of the complaint specifically addressing the tortious interference claim, Button alleged the following:

> 200. Upon information and belief, Penta Fund, Ms. Irish, Mr. Ellis, and Level Four Holdings intentionally induced Level Four Inc. not to comply with the Employment Agreement by classifying Mr. Button's termination as "for cause" in violation of the Employment Agreement and without justification.
>
> 201. Upon information and belief, the willful interference of Penta Fund, Ms. Irish, Mr. Ellis, and Level Four Holdings with Mr. Button's employment contract was carried out to benefit themselves regardless of the negative repercussions on Level Four Inc.
>
> 202. The actions of Penta Fund, Ms. Irish, Mr. Ellis, and Level Four Holdings as alleged herein constitute a reckless, intentional, conscious, and wanton disregard of Mr. Button's rights.
>
> 203. Penta Fund, Ms. Irish, Mr. Ellis, and Level Four Holdings knew or should have known that their actions were reasonably likely to, and actually did, injure Mr. Button.

Standing alone, these allegations are conclusory. However, in considering a motion to dismiss, we review "the whole complaint," not just isolated sections. *Smith v. Summerfield*, 108 N.C. 284, 289 (1891). In context, the factual basis for Button's allegation that the relevant defendants acted with malice is readily apparent.

¶ 63 Button's complaint contains a lengthy background section in which he alleges various facts common to all subsequent legal claims. In this section, he alleges that (1) Penta Fund was a manager and majority stakeholder in Level Four Holdings, which owned a majority interest in Level Four Inc.; (2) Irish and Ellis were both Managing Partners and Investment Committee members who had substantial financial interests

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do not suffice in this context. 263 N.C. 549, 559 (1965). Indeed, the majority's characterization of the pleading requirements as "strict" finds no support in our caselaw and is inconsistent with our modern system of notice pleading.

in Penta Fund; (3) Level Four Inc. "relied substantially on loans from Penta Fund for the funding of its operations"; (4) the loans Level Four Inc. obtained from Penta Fund before Button was hired "bore interest at a range of variable and fixed rates up to 18[percent] per annum"; (5) Button negotiated for and secured a provision in his Employment Agreement limiting the interest rate Penta Fund could charge on loans extended to Level Four Inc. to 2.5 percent; (6) throughout his tenure, Button received exclusively positive feedback regarding his performance as CEO; (7) Irish, Ellis and Penta Fund all pressured Button to waive the interest rate-limiting provision in the Employment Agreement and agree to loans charging Level Four Inc. significantly higher interest rates; (8) Irish and Ellis "commingled the operations of Level Four Inc., Level Four Holdings, and Penta Fund"; (9) after Button was terminated, Irish installed herself as CEO of Level Four Inc. and entered into loan agreements allowing Penta Fund to charge Level Four Inc. an interest rate in excess of the rate limit contained in Button's Employment Agreement; (11) "[n]o Defendant, nor any other person or entity, has informed Mr. Button for the purported basis for his 'for cause' termination from Level Four Inc"; and (12) "[t]hese actions . . . have been taken to benefit Penta Fund and Penta Fund's investors" and "have increased the likelihood that Level Four Inc. . . . will become insolvent and required to seek bankruptcy protection." These factual allegations provide crucial context and support for Button's tortious interference claim.

¶ 64 As corporate non-outsiders to Level Four Inc., Ellis, Penta Fund, and Level Four Holdings enjoy the presumption that they were acting in Level Four Inc.'s interests when they allegedly caused Level Four Inc. to terminate the Employment Agreement with Button. But Button has plainly alleged that these defendants were not acting in *Level Four Inc.'s* interests when they terminated his employment—he contends they were acting to further *their own* financial interests as Level Four Inc.'s creditors by firing him to get around the interest rate cap contained in the Employment Agreement. Common sense dictates that, generally speaking, debtors prefer lower interest rates to higher interest rates. Common sense also dictates that retaining a CEO with a flawless record of performance is preferable to firing one. Here, Button alleges that the defendants (1) sought loans charging Level Four Inc. higher interest rates than the loans Level Four Inc. would have received if the Employment Agreement had been respected, (2) terminated a CEO who had never received any negative performance feedback, and (3) personally benefitted from this result even as Level Four Inc.'s business prospects suffered. These factual allegations were sufficient to displace

the presumption that the defendants were acting in Level Four Inc.'s interests and sufficient to state a claim for tortious interference.

¶ 65 The defendants may have a plausible explanation for why their alleged actions were justified. Or they may demonstrate that the facts are not as Button has alleged. But nothing in Button's complaint allows a court to plausibly infer that their actions served Level Four Inc.'s interests rather than their own personal interests. Button's complaint does not "reveal[ ] that the interference was justified or privileged" and it "admit[s] of no motive for interference other than malice." *Wells Fargo Ins. Servs. USA, Inc.*, 372 N.C. at 285. Accordingly, I would hold that the trial court erred in granting the motion to dismiss Button's tortious interference claims as against Penta Fund, Level Four Holdings, and Ellis.

III. Conclusion

¶ 66 For the foregoing reasons, I concur with respect to the majority's conclusion that the trial court possessed personal jurisdiction over both Level Four Holdings and Ellis, and dissent with respect to the majority's decision not to reach the merits on Button's declaratory judgment and tortious interference claims. Were we to reach the merits, I would affirm the trial court's dismissal of Button's declaratory judgment claims; however, I would hold that Button has stated a cognizable claim for tortious interference as against Penta Fund, Level Four Holdings, and Ellis.

Justices HUDSON and ERVIN join in this opinion concurring in part and dissenting in part.

HOPE v. INTEGON NAT'L INS. CO.

[380 N.C. 482, 2022-NCSC-20]

TAMMY LOU HOPE
v.
INTEGON NATIONAL INSURANCE COMPANY

No. 41A21

Filed 11 March 2022

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, No. COA20-265, 2020 WL 7974003 (N.C. Ct. App. Dec. 31, 2020), affirming in part and reversing in part a summary judgment order entered on 22 November 2019 by Judge Henry L. Stevens IV in Superior Court, Sampson County, and remanding the case. Heard in the Supreme Court on 16 February 2022.

Brent Adams & Associates, by Brenton D. Adams and Diana Devine, for plaintiff-appellant.

Bennett Guthrie PLLC, by Rodney A. Guthrie and Jasmine M. Pitt, for defendant-appellee.

PER CURIAM.

AFFIRMED.[1]

1. The unpublished decision of the Court of Appeals, *Hope v. Integon Nat'l Ins. Co.*, No. COA20-265, 2020 WL 7974003 (N.C. Ct. App. Dec. 31, 2020), is available at https://appellate.nccourts.org/opinions/?c=2&pdf=39635.

IN RE LENNANE

[380 N.C. 483, 2022-NCSC-21]

IN THE MATTER OF FRANK LENNANE, PETITIONER

ADT, LLC, EMPLOYER

AND

NORTH CAROLINA DEPARTMENT OF COMMERCE, DIVISION OF EMPLOYMENT SECURITY, RESPONDENT

No. 3A21

Filed 11 March 2022

Unemployment Compensation—good cause—attributable to employer—employee's burden

Petitioner, a former service technician for a security company, was disqualified from receiving unemployment benefits where, although he had good cause to leave his employment, he failed to carry his burden of showing that his resignation was attributable to his employer. In response to petitioner's ongoing knee pain, the employer had made an out-of-state administrative position available and attempted to give petitioner assignments that were less strenuous on his knees; however, petitioner rejected the out-of-state position, did not take additional Family and Medical Leave, and chose to resign.

Justice EARLS dissenting.

Justices HUDSON and ERVIN join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 274 N.C. App. 367 (2020), affirming an order entered on 17 February 2020 by Judge W. Robert Bell in Superior Court, Haywood County. Heard in the Supreme Court on 6 January 2022.

Legal Aid of North Carolina, Inc., by Joseph Franklin Chilton, Cindy M. Patton, John R. Keller, and Celia Pistolis, for petitioner-appellant.

North Carolina Department of Commerce, Division of Employment Security, by Elias W. Admassu, R. Glen Peterson, and Sharon A. Johnston, for respondent-appellee.

BARRINGER, Justice.

¶ 1 In this case, we consider whether to uphold the determination that petitioner Frank Lennane is disqualified from receiving unemployment benefits. To guide the interpretation and application of unemployment benefits under Chapter 96 of the General Statutes of North Carolina, the legislature has declared the public policy of this State for nearly ninety years as the following:

> Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this State. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The Legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this State require the enactment of this measure, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.

Unemployment Compensation Law, ch. 1, sec. 2, 1936 N.C. Pub. [Sess.] Laws (Extra Sess. 1936) 1, 1 (codified at N.C.G.S. § 96-2 (2021)).

¶ 2 This declaration guides our analysis of the issue before us: whether Lennane's leaving work was attributable to his employer as required by N.C.G.S. § 96-14.5(a) to avoid disqualification for unemployment benefits. *See* N.C.G.S. § 96-2. Having considered the legislature's declared public policy, the plain language of the applicable statute, and the binding findings of fact, we conclude that Lennane failed to show that his leaving work was attributable to his employer as required by N.C.G.S. § 96-14.5(a).

I. Background

¶ 3 Lennane left work on 16 November 2018. Lennane filed an initial claim for unemployment benefits on 11 November 2018. An adjudicator held Lennane disqualified for benefits, and Lennane appealed. Thereafter, an appeals referee conducted a hearing on the matter. The appeals referee affirmed the prior decision and ruled that Lennane was disqualified for unemployment benefits because he failed to show good cause attributable to the employer for leaving as required by N.C.G.S. § 96-14.5(a). Lennane then appealed to the Board of Review for the North Carolina Department of Commerce. The Board of Review adopted the appeals referee's findings of fact as its own and concluded that the appeals referee's decision was in accord with the law and the facts. Accordingly, the Board of Review affirmed the appeals referee's decision. Lennane next appealed to the superior court, which affirmed the Board of Review's decision. Lennane then appealed to the Court of Appeals.

¶ 4 A divided panel of the Court of Appeals affirmed the superior court's order. *In re Lennane*, 274 N.C. App. 367, 372 (2020). When considering whether the superior court erred by affirming the Board of Review's determination, the Court of Appeals compared this case with the Court of Appeals decision in *Ray v. Broyhill Furniture Industries*, 81 N.C. App. 586 (1986). *In re Lennane*, 274 N.C. App. at 370. In *Ray*, the Court of Appeals "held that the claimant proved her reason for leaving was attributable both to the employer's action (the threat to fire her if she went over her supervisor's head) and inaction (her supervisor's failure to put in her transfer request)." *Id.* (cleaned up). Unlike *Ray*, the Court of Appeals explained that, in this case, the employer acted to help Lennane. *Id.*

¶ 5 The Court of Appeals then considered whether competent evidence supported the challenged findings of fact and whether those findings of fact supported the conclusion of law. *Id.* at 370–72. The Court of Appeals concluded that competent evidence supported the challenged findings of fact and that the findings of fact supported the conclusion that Lennane "failed to establish that his good cause for leaving work was attributable to the employer." *Id.* at 372 (cleaned up).

¶ 6 To the contrary, the dissent contended that:

> It is not [Lennane]'s fault that his knee suffers from osteoarthritis, nor is it his fault that his employer's "business needs" precluded accommodations that would not require him to sacrifice his health. He

> was thus rendered "unemployed through no fault of [his] own[,]" N.C. Gen. Stat. § 96-2.

Id. at 373 (Inman, J., dissenting) (second and third alterations in original).

¶ 7 According to the dissent, like in *Ray*, Lennane's employer's inaction "placed [him] in the untenable position of having to choose between leaving [his] job and becoming unemployed or remaining in a job which . . . exacerbated [his medical] conditions." *Id.* (alterations in original) (quoting *Ray*, 81 N.C. App. at 592–93). Thus, the dissent, relying on N.C.G.S. § 96-2 and *Ray*, would have held that Lennane left work for good cause attributable to the employer. *Id.* The dissent disagreed with the majority's conclusion of law but did not identify any findings of fact as being unsupported by competent evidence. *Id.* at 372–73.

¶ 8 Lennane appealed based on the dissenting opinion. Accordingly, we now consider the issue Lennane identified as distinguishing the majority and dissenting opinions: "whether his leaving was attributable to the employer."

II. Standard of Review

¶ 9 "The standard of review in appeals from the [Department of Commerce, Division of Employment Security], both to the superior court and to the appellate division, is established by statute." *Binney v. Banner Therapy Prods., Inc.*, 362 N.C. 310, 315 (2008). In these judicial proceedings, "the findings of fact by the Division, if there is any competent evidence to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law." N.C.G.S. § 96-15(i) (2021); *see also* N.C.G.S. § 96-15(h) (establishing procedure for judicial review of a decision of the Board of Review); *Binney*, 362 N.C. at 315. When no challenge to a finding of fact is made, an appellate court presumes that the finding of fact is supported by the evidence, and the finding of fact is binding on appeal. *See, e.g.*, *Carolina Power & Light Co. v. Emp. Sec. Comm'n of N.C.*, 363 N.C. 562, 564 (2009); *State ex rel. Emp. Sec. Comm'n v. Jarrell*, 231 N.C. 381, 384 (1950). We review de novo whether the Division's findings of fact support the conclusions of law. *Carolina Power*, 363 N.C. at 564.

III. Analysis

¶ 10 Article 2C of Chapter 96 of the North Carolina General Statutes sets forth when benefits are payable for unemployment and when an individual is disqualified from receiving benefits. N.C.G.S. §§ 96-14.1 to -14.16 (2021). As relevant to this appeal, subsection 96-14.5(a) mandates that "[a]n individual does not have a right to benefits and is disqualified

from receiving benefits if the Division determines that the individual left work for a reason other than good cause attributable to the employer." N.C.G.S. § 96-14.5(a). "When an individual leaves work, the burden of showing good cause attributable to the employer rests on the individual and the burden may not be shifted to the employer." N.C.G.S. § 96-14.5(a). Good cause exists when an individual's "reason for [leaving] would be deemed by reasonable men and women valid and not indicative of an unwillingness to work." *In re Watson*, 273 N.C. 629, 635 (1968). "A separation is attributable to the employer if it was produced, caused, created or as a result of actions by the employer." *Carolina Power*, 363 N.C. at 565 (cleaned up).

¶ 11 Since the Division conceded on appeal that Lennane had good cause to leave work, the only question before us is whether the findings of fact support the conclusion of law that Lennane's leaving work was not attributable to his employer. *See* N.C.G.S. § 96-14.5(a). We cannot, as the Court of Appeals' dissent did, substitute our view of the evidence for the findings of fact before us. *See In re Lennane*, 274 N.C. App. at 373 (Inman, J., dissenting) (acknowledging the findings of fact concerning the employer's attempt to make accommodations but dismissing them based on the dissent's interpretation of the manager's testimony and making its own findings concerning the detriment to Lennane's health from performing the equipment installations, Lennane's ability to perform the number of installations required of him by his employer, and Lennane's fault).

¶ 12 All findings of fact by the Division are as follows:

> 1. The claimant filed an initial claim for unemployment insurance benefits on November 11, 2018.
>
> 2. The claimant last worked for ADT LLC on November 16, 2018 as a service technician.
>
> 3. The Adjudicator issued a determination under Issue No. 1669952 holding the claimant disqualified for benefits. The claimant appealed. Pursuant to [N.C.]G.S. [§] 96-15(c), this matter came before Appeals Referee Stephen McCracken on August 7, 2019. Present for the hearing: Frank Lennane, claimant; Joseph Chilton, claimant representative; Randall Goodson, employer witness and installation/service manager; Stephanie Morgan, employer witness and administrative team leader; Michael Curtis, employer representative.

The employer's representative participated in the hearing via teleconference following a written request to participate by telephone due to a travel distance of more than 40 miles to the hearing location. Neither parties were prejudiced by the hybrid hearing.

4. The claimant was employed by the above-captioned employer from February 1, 2012 until November 16, 2018.

5. As a service technician for the employer, the claimant conducted service calls to the employer's residential and commercial customers with security or business alarm systems. Generally, service calls only require a part/component replacement and, generally, do not require a significant amount of physical activity. Although, a service call sometimes required some ladder climbing and crawling.

6. At times, the claimant had to perform residential and commercial security system and alarm system installations. Installations require more physical work, such as more drilling, climbing, and crawling, than a service call.

7. The claimant was aware of his job duties and responsibilities and was trained to perform both service calls and installation jobs.

8. In 2014, the claimant injured his left knee while on the job. Said injury caused the claimant to undergo surgery. Following the claimant's surgery, the claimant began to favor his right knee, which resulted in the claimant experiencing regular pain in his right knee. The claimant had a permanent partial disability in his left knee.

9. The claimant kept the employer informed of his physical health conditions.

10. In 2016, service technicians began to perform installation jobs following a business merger and a merger of the employer's service and installation departments.

11. The claimant had difficulty performing installations due to the poor physical conditions of his knees, of which he notified his manager. The claimant asked his manager if there were other jobs, such as administrative or clerical work, that in which [sic] he could apply for or be placed.

12. The employer only had administrative positions in Spartanburg, South Carolina and Knoxville, Tennessee, and the claimant was unwilling to relocate from North Carolina.

13. In 2017, the claimant took a [five] week leave of absence via the Family and Medical Leave Act (FMLA) to rest his knees and seek additional medical intervention.

14. On or about September 5, 2017, the claimant returned to work from his medical leave. The claimant's doctor requested that the claimant not stand or walk for prolonged periods.

15. The claimant asked his manager, Randall Goodson, if he could only be assigned service calls due to the less strenuous nature of those jobs. The claimant's manager denied the claimant's request because he needed to keep a fair balance of work distribution among all of the service technicians.

16. However, the claimant's manager made attempts thereafter to not dispatch the claimant on the most strenuous or large installations.

17. If the claimant had to be dispatched on a large installation, then manager Goodson would try to ensure that he (claimant) had another service technician available to assist him.

18. In October 2018, the claimant had an appointment with a surgeon to discuss treatment for his knees. At which time, the claimant was told that he could undergo surgery or stem cell therapy. The claimant was unwilling to undergo either options [sic].

19. As of November 2018, the claimant was continuing to fully perform his service technician job duties and responsibilities.

20. On or about November 8, 2018, the claimant notified the employer that he was resigning from employment because he was no longer able to perform his job due to the physical health condition of his knees.

21. Prior to the claimant's resignation, he did not make any formal or written requests for workplace accommodations from either the employer's administrative or human resources staff members. During 2018, the claimant did not request intermittent leave via FMLA.

22. The claimant left this job due to personal health or medical reasons.

23. At the time the claimant left, the employer did have continuing service technician work available for him.

¶ 13 Lennane argues that the findings of fact show that the employer's actions and inactions, not those of Lennane, caused him to leave work to protect his health. According to Lennane, the findings of fact show that his employer acted by changing his job duties by increasing the amount of installation work required for his position and failed to act by not implementing his request to only be assigned service calls. Lennane, like the dissent, advances the proposition that "*Ray* [c]ompels [a] [c]onclusion" that Lennane left work with good cause attributable to the employer. Lennane also contends that his unwillingness to relocate for an administrative position with his employer cannot support the conclusion of law that he left work without good cause attributable to the employer and relies on the Court of Appeals' decision in *Watson v. Employment Security Commission of North Carolina*, 111 N.C. App. 410 (1993).

¶ 14 Admittedly, Lennane's employer modified the allocation of installation jobs to service technicians two years before Lennane left work, and Lennane had difficulty performing installations because of pain in his knees. However, the findings of fact do not support the causal link required by N.C.G.S. § 96.14.5(a) between the employer's action (change in allocation of installation work) or inaction (not ceding to Lennane's request) and Lennane's leaving.

¶ 15 Lennane has not shown that his allocation of installation jobs as modified by his employer in 2016 was more detrimental to his health than his prior duties and responsibilities. Before 2016, Lennane performed service calls as well as installations at times. Lennane's partial disability in his left knee and pain in his right knee predated the 2016 modification. In 2016, only the allocation of service calls and installations assigned to service technicians, like Lennane, changed. Although installations involved "more physical work, such as more drilling, climbing, and crawling, than a service call," Lennane's "doctor requested that [Lennane] not stand or walk for prolonged periods." There is no finding that the installations increased the amount of prolonged standing and walking by Lennane relative to service calls. *See In re Lennane*, 274 N.C. App. at 370 ("[Lennane] provided no medical restrictions or limitations on bending, stooping, or crawling to [the e]mployer. The only medical request [Lennane] gave [the e]mployer was in September 2017 that he not stand or walk for prolonged periods."). Thus, we cannot conclude that the employer's action caused Lennane's leaving.

¶ 16 Despite our sympathy for those with health conditions, we cannot fill in the facts for Lennane. We only have the binding findings of facts properly before us, and the burden is on Lennane pursuant to N.C.G.S. § 96-14.5(a) to show good cause attributable to the employer. We also do not rely on *Barnes v. Singer Co.*, 324 N.C. 213 (1989). In *Barnes*, this Court imposed the burden on the employer and declined to address whether there was good cause attributable to the employer. *Id.* at 216, 217; *see also id.* at 219 (Meyer, J., dissenting) ("The burden should be upon the party who is in the best position to prove the matter in question. Here, it is the claimant who can best prove the crucial fact, not yet established in this case, that transportation to the new plant site is, in a practical sense, unavailable to her.").

¶ 17 Our legislature expressly placed on the individual the burden—that cannot be shifted to an employer—to show good cause attributable to the employer when the individual left work. *See* N.C.G.S. § 96-14.5(a). The goal sought by unemployment insurance is to avoid economic insecurity from involuntary unemployment. *See* N.C.G.S. § 96-2. The legislature for nearly ninety years has recognized that this achievement "can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment." *Id.* Given the requirement of *attribution* to the employer under N.C.G.S. § 96-14.5(a), we must consider both an individual's and employer's efforts to preserve the employment relationship when assessing whether the individual's

leaving is attributable to the employer. Consideration of these efforts is consistent also with the legislative purposes of "encouraging employers to provide more stable employment" and "prevent[ing] [the] spread [of involuntary unemployment.]" N.C.G.S. § 96-2. If we ignore the efforts of employer in the binding findings of fact, like the dissent, employers are not encouraged to provide stable employment. Likewise, if we ignore the efforts of the employed individual, employers are not encouraged to provide stable employment. Thus, we review the findings of fact concerning both Lennane's and his employer's efforts to preserve the employment relationship.

¶ 18 Here, Lennane made some efforts to preserve his employment. He "kept [his] employer informed of his physical health conditions," "notified his manager" that he "had difficulty performing installations due to the poor physical condition of his knees," and his doctor in 2017 "requested that [Lennane] not stand or walk for prolonged periods." He "asked his manager if there were other jobs, such as administrative or clerical work, that . . . he could apply for or be placed." In 2017, he "took a [five] week leave of absence via the Family and Medical Leave Act . . . to rest his knees and seek additional medical intervention." He also "asked his manager, Randall Goodson, if he could only be assigned service calls due to the less strenuous nature of those jobs."

¶ 19 In response to Lennane's efforts, the employer made efforts to preserve the employment relationship. Lennane's manager "made attempts [after Lennane's request] to not dispatch [Lennane] on the most strenuous or large installations" and "would try to ensure that [Lennane] had another service technician available to assist him." The employer also "had administrative positions in Spartanburg, South Carolina and Knoxville, Tennessee," but not in North Carolina.

¶ 20 Ultimately, Lennane was unwilling to relocate from North Carolina for an administrative position and did not take additional Family and Medical Leave to treat his knees. Lennane subsequently resigned, working his last day on 16 November 2018.

¶ 21 Given the foregoing, his employer acted to preserve the employment relationship. The employer, at Lennane's request, provided Lennane the option to take an administrative position where the employer had administrative positions. The employer further made attempts to adjust the assignment of installations to be more favorable to Lennane given Lennane's request. Lennane also had choices other than leaving his employment—choices he did not take. Lennane could have relocated from North Carolina for an administrative position with his employer, an

option provided by his employer at his request, or he could have taken additional Family and Medical Leave to treat his knees as his employer previously supported. Prior to his leaving, Lennane also had continued to fully perform his duties and responsibilities.

¶ 22 For these reasons, *Ray* is easily distinguishable from this case. In *Ray*, the employer did not act to preserve the employment relationship: the supervisor refused the employee Ray's request to transfer to another department, denied her request for a protective mask, and threatened to terminate her employment if she conveyed her requests to the plant manager. 81 N.C. App. at 588. It is also "axiomatic that this Court is not bound by precedent of our Court of Appeals." *In re L.R.L.B.*, 377 N.C. 311, 2021-NCSC-49, ¶ 31 (cleaned up). Thus, we neither endorse nor dismiss *Ray*.

¶ 23 The Court of Appeals' decision in *Watson v. Employment Security Commission of North Carolina* is also not binding on this Court and is distinguishable. Unlike *Watson*, the employer in this matter did not relocate, and Lennane did not leave work because of unreliable transportation to work. *See* 111 N.C. App. at 415. Also, unlike this matter, the binding findings of fact in *Watson* reflected substantial attempts by the employee, *Watson*, to maintain the employment relationship. She expressed her concern to her employer about reliable transportation to and from work before the relocation; she obtained some transportation from her supervisor; she used her own car until it broke down; and she made a series of other arrangements to get to work. *See id.* at 412. Watson did not leave work until she arrived late to work on account of her co-worker's truck being in disrepair, was sent home as a penalty for arriving late, believed the truck beyond repair, and had no other foreseeable means of transportation to and from work every day of her work week. *Id.* at 412. As a result, the Court of Appeals concluded that "[a]ll of the Commission's findings of fact make clear that petitioner desired, and attempted, to continue to work for respondent employer," such that "[h]er leaving work was solely the result [of the relocation of the plant by her employer]." *Id.* at 415. Given the binding findings of fact before us, we cannot conclude the same in this matter. Thus, we neither endorse nor dismiss *Watson v. Employment Security Commission of North Carolina* but conclude that it is not analogous to this case.[1]

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1. The dissent acknowledges that assessing attribution to the employer is highly fact-specific and relies on other cases that are factual distinct from the matter before us. Thus, further discussion of these cases from our lower courts would offer little (if any) additional clarity to our decision here.

¶ 24 Although Lennane left work for good cause as conceded by the Division, the legislature created unemployment insurance for a more limited subset of individuals: those who left work for "good cause attributable to the employer." N.C.G.S. § 96-14.5(a). Here, the employer made available to Lennane an administrative position as Lennane specifically requested. The employer offered positions in all the locales where the employer had such positions. The employer, thus, acted. Lennane still left, but his employer's inaction did not cause Lennane's leaving. Lennane had made other requests to his employer, but an employer need not cede to every request of an individual employed by the employer to avoid having his inaction deemed the cause of an individual's leaving.

¶ 25 This Court's holding honors the limitation created by our legislature on unemployment benefits, consistent with the plain language of the statute and the legislature's express purpose of "encouraging employers to provide more stable employment" to prevent the spread of involuntary unemployment. N.C.G.S. § 96-2. "[T]he actual words of the legislature are the clearest manifestation of its intent, [so] we give every word of the statute effect, presuming that the legislature carefully chose each word used." *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201 (2009). This Court in *In re Watson* explained:

> In [N.C.]G.S. [§] 96-14(1) it is provided that one is disqualified from receiving benefits under the act if he left work voluntarily "without good cause attributable to the employer." The disqualification imposed in [N.C.]G.S. [§] 96-14(3) for failure to accept suitable work "without good cause" does not carry the qualifying phrase "attributable to the employer." It cannot be presumed that the omission of these qualifying words was an oversight on the part of the Legislature. Thus, the "good cause" for rejection of tendered employment need not be a cause attributable to the employer.

273 N.C. at 635.

¶ 26 Decades later, the legislature still does not omit the statutory language "attributable to the employer" for individuals leaving work: "[a]n individual is disqualified for any remaining benefits if the Division determines that the individual has failed, without good cause, to . . . [a]ccept suitable work when offered," N.C.G.S. § 96-14.11(b), but "disqualified from receiving benefits if the Division determines that the individual left work for a reason other than good cause *attributable to the employer*," N.C.G.S.§ 96-14.5(a) (emphasis added). Thus, we decline to create

insurance paid for by employers for unemployment not attributable to an employer's actions or inactions.

IV. Conclusion

¶ 27 Unemployment insurance does not provide benefits to individuals who "left work for a reason other than good cause attributable to the employer." N.C.G.S. § 96-14.5(a). While Lennane, as conceded by the parties, left work for good cause, he has failed to satisfy his burden to show that his leaving work was "attributable to the employer" as a matter of law. *Id.* Accordingly, we affirm the Court of Appeals' decision.

AFFIRMED.

Justice EARLS dissenting.

¶ 28 Both Mr. Lennane and the Employment Security Division agreed that Mr. Lennane's reason for leaving his job, after having worked for ADT as a service technician for over six and a half years, was for "good cause" as defined by law. Indeed, respondent acknowledged to the court below that "[t]he Petitioner's reason for resigning was the personal knee issues, and the Division's Findings of Fact support the conclusion it was for 'good cause.' " Where, as the dissent below noted, "[r]espondent concedes [petitioner] had good cause to resign," *In re Lennane*, 274 N.C. App. 367, 373 (2020) (Inman, J., dissenting), the only issue for this Court is whether Mr. Lennane has met his burden of establishing that the good cause was attributable to his employer. Here the majority observes that the Division conceded good cause, but then illogically concludes that Mr. Lennane failed to establish a "casual link" to explain why he left work. The majority then imposes a newly crafted "efforts to preserve the employment relationship" test and infers from the absence of factual findings that in fact, Mr. Lennane did not have good cause to leave his employment because he refused to leave North Carolina for Spartanburg, South Carolina or Knoxville, Tennessee and did not take additional Family and Medical Leave. These are all, in essence, arguments that he did not have good cause to leave his employment.

¶ 29 The appeals referee's factual findings here do not suggest that ADT offered Mr. Lennane service calls that would comply with his medical restrictions at the time rather than installation work. Based on the findings of fact, "[t]he claimant's manager denied the claimant's request [only to be assigned service rather than installation calls] because he needed to keep a fair balance of work distribution among all of the service technicians." In these circumstances, the decision not to offer Mr. Lennane

work that he could perform safely is what led to the good cause for his need to stop working. Mr. Lennane carried his burden of demonstrating that the good cause for his leaving was attributable to a decision of the employer. He should not be disqualified from receiving unemployment benefits. Therefore, I dissent.

¶ 30 Although our task here is to determine whether the Division's findings of fact support its legal conclusions, the majority begins with an examination of the public policy behind the General Assembly's establishment of unemployment compensation. Ironically, the legislature's declared policy actually supports the conclusion that ADT did not do enough here to keep Mr. Lennane on its payroll with work that he could safely perform given his health condition, rather than the majority's conclusion that Mr. Lennane should have moved out of state to work in an administrative position or take unpaid leave. According to the 1936 statute, economic security in North Carolina is promoted by "encouraging employers to provide more stable employment." N.C.G.S. § 96-2 (2021) (carrying forward the original statutory language). Moreover, "the public good and the general welfare of the citizens of this State require . . . the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own." *Id.* The statute is intended to protect North Carolina workers and to encourage employers to provide stable employment.

¶ 31 Whatever the policy implications, the more specific language of the statute's disqualification provision applies here. *See In re Steelman*, 219 N.C. 306, 310-11, (1941) (the general designation of workers selected for benefits being those who are "unemployed through no fault of their own." is constrained by the more specific provisions of the statute if the provisions would otherwise conflict). This Court has found that "sections of the act imposing disqualifications for its benefits should be strictly construed in favor of the claimant and should not be enlarged by implication or by adding to one such disqualifying provision words found only in another." *In re Watson*, 273 N.C. 629, 639 (1968); *see also Marlow v. N.C. Emp. Sec. Comm'n*, 127 N.C. App. 734, 735 (1997) ("Further, in keeping with the legislative policy to reduce the threat posed by unemployment to the 'health, morals, and welfare of the people of this State,' statutory provisions allowing disqualification from benefits must be strictly construed in favor of granting claims." (quoting N.C.G.S. § 96-2 (1995)), *disc. rev. denied*, 347 N.C. 577 (1998); *Lancaster v. Black Mountain Ctr.*, 72 N.C. App. 136, 141 (1984) (same). It goes without saying that this Court should not be imposing new disqualification rules that have no basis in the statute. *See* N.C.G.S. § 96-14.5.

¶ 32 'Good cause,' which was conceded here, is understood to be "a reason which would be deemed by reasonable men and women valid and not indicative of an unwillingness to work." *Carolina Power & Light Co. v. Emp. Sec. Comm'n of N. C.*, 363 N.C. 562, 565 (2009) (quoting *Intercraft Indus. Corp. v. Morrison*, 305 N.C. 373, 376 (1982)). Given that Mr. Lennane's reason for resigning was for "good cause," it is therefore clear that the facts do not support any conclusion that he resigned because he was unwilling to work. And yet, that is precisely what the majority ultimately concludes, that Mr. Lennane had "other choices" but chose not to keep working. The majority's conclusion is not supported by the factual findings in this case.

¶ 33 If the separation is "produced, caused, created or as a result of actions by the employer," it is attributable to the employer. *Id.* (quoting *Couch v. N.C. Emp. Sec. Comm'n*, 89 N.C. App. 408 at 409-10, *aff'd per curiam*, 323 N.C. 472 (1988)). Inaction by the employer also can provide good cause to leave a job. *See, e.g.*, *Ray v. Broyhill Furniture Indus.*, 81 N.C. App. 586, 592–93 (1986) (attributing a supervisor's failure to put in a transfer request on behalf of an employee to a department with fewer health risks as one of the bases of good cause for the employee's departure). Good cause is attributable to the employer where circumstances caused by the employer "make continued work logistically impractical" or "when the work or work environment itself is intolerable." *Carolina Power*, 363 N.C. at 567–68.

¶ 34 Examples of good cause attributable to employers when they create circumstances that make work logistically impractical for the employee are instructive. In *Barnes v. Singer Co.*, the employee quit after her employer relocated her job and she did not have reliable transportation to her new place of employment. 324 N.C. 213, 214, 216–17 (1989). In *Couch v. North Carolina Employment Security Commission*, a woman who quit her job after her employer unilaterally and substantially reduced her working hours was not disqualified from receiving unemployment benefits. 89 N.C. App. 405, 412, *aff'd per curiam*, 323 N.C. 472 (1988). In *Couch*, the Court of Appeals remanded the case to determine whether the decrease of two hours per day of work was substantial enough to constitute good cause. *Id.* at 408, 412–13. In *Milliken & Co. v. Griffin*, the Court of Appeals found good cause attributable to the employer when Ms. Griffin quit after her employer failed to heed her doctor's advice that she receive work that did not aggravate her muscle spasms or be assigned shorter shift hours. 65 N.C. App. 492, 497 (1982), *disc. rev. denied*, 311 N.C. 402 (1984). The Court of Appeals based its decision on the fact that Ms. Griffin spoke to her manager about her health issues and desire

for alternative work options within the company, ultimately found none and then resigned. *Id.* at 495. None of these precedents are reversed by the Court's decision in this case.

¶ 35 Instead, whether good cause attributable to the employer exists is a highly fact-specific determination, for which Mr. Lennane bears the burden of proof. The fact to be decided here was not whether ADT or Mr. Lennane made the most effort to "preserve the employment relationship," but rather, who was responsible for the circumstances that led to Mr. Lennane resigning for good cause. It is most important to remember that this is not a fault-based inquiry, ADT may have had a very good business reason for not allowing Mr. Lennane to work only service calls. But in this particular workplace, it was ADT's decision to make, not Mr. Lennane's.

¶ 36 As the factual findings explain, ADT had previously divided its home security system service and installation departments. Despite Mr. Lennane's having been trained to do the more physically demanding job of installation work, he was still primarily a service technician. He had worked at this job for over six years by the time he quit, and four of those years were spent dealing with various knee injuries. The injury to his left knee happened while he was on the job, and despite undergoing knee surgery, he sustained a permanent partial disability in that knee. This injury and the subsequent limit on the full use of his left knee caused Mr. Lennane to favor his right knee, which led to him "experiencing regular pain in his right knee."

¶ 37 As his pain increased, Mr. Lennane also experienced a reshuffling of his duties at work when a merger caused ADT to combine its service and installation departments. The loss of that structural divide required service technicians to do installation work as well. There was conflicting testimony at the hearing regarding how much of an increase in installation work this created for Mr. Lennane, and the findings of fact do not resolve that question.[1] But the appeals referee did find that

1. In the absence of detailed findings of fact regarding the effect on Mr. Lennane of the change in work assignments from only service work to a mix of service and installation work, despite testimony on this point, the majority erroneously concludes that therefore Mr. Lennane failed to establish a causal nexus between ADT's actions and his leaving work. Not only does this determination negate the concession that Mr. Lennane left for good cause, it also assumes that in the absence of factual findings, the employer's version of events must be correct. Mr. Lennane did testify about the causal nexus between ADT's inability to accommodate his need for limited walking and standing and his decision to resign. If there is testimony tending to prove a material fact but the absence of a related factual finding, it is not the role of this Court to make assumptions, draw contrary inferences, or make its own factual findings.

Mr. Lennane "kept the employer informed of his physical health conditions" and that he "had difficulty performing installations due to the poor physical conditions of his knees, of which he notified his manager." He asked about two less strenuous work options: a desk job or forgoing installation work. Neither option was a realistic choice for him because the administrative work was only available out of state and the manager "needed to keep a fair balance of work distribution among all of the service technicians."

¶ 38 Mr. Lennane tried to continue with his job by taking a five-week FMLA leave of absence to heal, but that hiatus could not permanently fix the deterioration of his knees. His manager still would assign him installations while attempting to keep these jobs smaller or to assign a second service technician to assist him on large installations. Yet, these attempts were not enough because Mr. Lennane's doctor recommended that he not walk or stand for long periods.

¶ 39 The findings of fact paint a vivid picture of someone who tried to hold on to his job despite chronic pain from a workplace injury, but who ultimately had good cause to leave. And the findings also present a picture of an employer that tried to accommodate his employees' bad knees in some fashion but who, for business reasons, failed to do so adequately. Just as in *Barnes*, in which the court concluded that materially moving an employee's job is good cause attributable to that employer, similarly here it should not be held against Mr. Lennane that ADT's only administrative work option was outside of North Carolina and that his manager's preference was to make an equal distribution of installation work among service technicians. ADT had less strenuous service work still available at Mr. Lennane's North Carolina location but chose not to let him focus only on that work. Given that the majority does not purport to overrule *Barnes*, but inexplicably decides not to rely on it, the principle established by this Court in *Barnes* remains good law, namely that: "[a]n employee does not leave work voluntarily when the termination is caused by events beyond the employee's control or when the acts of the employer caused the termination." *Barnes*, 324 N.C. at 216. There, an employer moving a plant eleven miles away to a location the employee could not commute to from her home, constituted good cause attributable to the employer. *Id.* In this case, requiring that Mr. Lennane move out of state to maintain employment that does not further damage his health similarly is holding him responsible for matters beyond his control. The application of the law here is not about sympathy for an injured worker, it requires an analysis of whether the good cause, conceded by respondent, was due to factors within the employer's control.

¶ 40 Ultimately, Mr. Lennane's manager decided not to meet his medical needs by assigning only service work and, just as the employee in *Ray*, Mr. Lennane chose his health and had to quit. Unlike the situation in *Ray*, however, Mr. Lennane did pursue several avenues to try to keep his job. All of the steps taken by Mr. Lennane – keeping his employer informed of his health problems, requesting a transfer to office work, taking FMLA leave, and asking for lighter field assignments – show an employee trying to keep working. Indeed, Mr. Lennane's pursuit of reasonable remedial measures exceeded the efforts to preserve employment undertaken by employee Ray, who did not take FMLA leave. More importantly, as the unanimous court in *Ray* pointed out, "[s]peculation as to what [claimant] *could have done*" is irrelevant. *Ray*, 81 N.C. App. at 592. (emphasis in original).

¶ 41 Mr. Lennane was in an even more compelling circumstance than the successful claimant in *Ray*. Mr. Lennane acquired his underlying health problems on the job. The findings of fact make clear that his health concerns arose from job requirements that had changed since his hire, even if the magnitude of that change is not specified. Mr. Lennane was a "person who must quit a job for health reasons but who is available for other employment," and therefore, "reason and justice demand that such a claimant receive unemployment benefits." *Griffin*, 65 N.C. App. at 497. Indeed, the logic of the Court of Appeals' decision in *Griffin* is compelling here, because in that case the very policy cited by the majority here was the basis of the Court of Appeals' conclusion that an employee whose health condition leads to unemployment is entitled to receive unemployment benefits:

> Milliken would have us follow those jurisdictions which have denied benefits to individuals who became unemployed because of sickness, accident or old age. . . . We find that the language in the *Mills* decision is in conflict with the policy behind North Carolina's Employment Security Act and application of the Act. The *Mills* court concluded that "involuntary unemployment" under the Act meant unemployment resulting from a failure of industry to provide stable employment; and that unemployment due to changes in personal conditions to the employee, which made it impossible for him to continue his job, was not the type covered by the Act. Our Legislature did not intend such a narrow application of the Act when it declared the following public policy to be

> accomplished by the Act: "[T]he public good and the general welfare of the citizens of this State require the enactment of this measure . . . for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own." G.S. § 96-2.

Id., at 497-98 (second and third alternations in original) (internal citations omitted). Both *Ray* and *Griffin* remain good law. The majority does not dispute the logic or reasoning of either decision. Instead, the majority finds a significant distinction that in *Ray* the employer "did not act to preserve the employment relationship" because Ray's supervisor denied a transfer request and refused to provide a protective mask. Even if denying a transfer request differs significantly from offering a transfer that requires moving out of state while denying limited work assignments at the current worksite, the ultimate question is who has created the condition under which continued employment is not possible. Based on the factual findings in this case, the relevant business decisions were made by ADT. Mr. Lennane wanted to work, he just could not continue to put too much strain on his knees by installing security systems.

¶ 42 The majority also goes beyond the findings of fact in assuming that Mr. Lennane could have continued to perform installation work for ADT so long as he periodically took FMLA leave to rest his knees. While there was some testimony in the record from Mr. Lennane concerning how frequently he already was resting his knees to no lasting effect, the assumption made by the majority is not in the appeals referee's findings of fact. We do not know from this record whether such leave would have been paid or unpaid, or even if it would have addressed the medical problem. On the record before us, Mr. Lennane left his job for good cause, namely, personal health or medical reasons, in circumstances in which his employer did have work that he could have performed, specifically service calls rather than installation work, but chose not to give him the option of doing that work. Mr. Lennane's good cause for leaving work was attributable to ADT, and he should not be disqualified from receiving unemployment benefits.

Justices HUDSON and ERVIN join in this dissenting opinion.

LAKE v. STATE HEALTH PLAN FOR TCHRS. & STATE EMPS.

[380 N.C. 502, 2022-NCSC-22]

I. BEVERLY LAKE, JOHN B. LEWIS, JR., EVERETTE M. LATTA, PORTER L. McATEER, ELIZABETH S. McATEER, ROBERT C. HANES, BLAIR J. CARPENTER, MARILYN L. FUTRELLE, FRANKLIN E. DAVIS, ESTATE OF JAMES D. WILSON, ESTATE OF BENJAMIN E. FOUNTAIN, JR., FAYE IRIS Y. FISHER, STEVE FRED BLANTON, HERBERT W. COOPER, ROBERT C. HAYES, JR., STEPHEN B. JONES, MARCELLUS BUCHANAN, DAVID B. BARNES, BARBARA J. CURRIE, CONNIE SAVELL, ROBERT B. KAISER, JOAN ATWELL, ALICE P. NOBLES, BRUCE B. JARVIS, ROXANNA J. EVANS, JEAN C. NARRON, AND ALL OTHERS SIMILARLY SITUATED

v.

STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES, A CORPORATION, FORMERLY KNOWN AS THE NORTH CAROLINA TEACHERS AND STATE EMPLOYEES' COMPREHENSIVE MAJOR MEDICAL PLAN, TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A CORPORATION, BOARD OF TRUSTEES OF THE TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE, DALE R. FOLWELL, IN HIS OFFICIAL CAPACITY AS TREASURER OF THE STATE OF NORTH CAROLINA, AND THE STATE OF NORTH CAROLINA

No. 436PA13-4

Filed 11 March 2022

Public Officers and Employees—State Health Plan amendments—constitutional contractual impairment claim—existence of contractual obligation

In an action asserting that amendments to the State Health Plan (SHP) removing premium-free options for retired state employees violated both the federal and state constitutions (the Contracts Clause and the Law of the Land Clause, respectively), retirees had a vested right to the noncontributory health plan benefits that existed at the time they were hired and for which they met the eligibility requirements because employees relied on the promise of the State's obligation to provide those benefits when they entered into the employment contract. However, summary judgment was inappropriate where there were genuine issues of material fact regarding whether the amendments constituted a substantial contractual impairment—the determination of which required an analysis of the relative value of different health plans offered at different times—and, if so, whether the impairment was reasonable and necessary to serve an important public purpose. Therefore, the matter was remanded for further factual findings by the trial court.

Justice BARRINGER concurring in part and dissenting in part.

Justice BERGER joins in this opinion concurring in part and dissenting in part.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 264 N.C. App. 174 (2019), reversing and remanding an order of summary judgment entered on 19 May 2017 by Judge Edwin G. Wilson, Jr. in Superior Court, Gaston County. Heard in the Supreme Court on 4 October 2021.

Gray, Layton, Kersh, Solomon, Furr & Smith, P.A. by Michael L. Carpenter, Christopher M. Whelchel, Marcus R. Carpenter, and Marshall P. Walker; Tin, Fulton, Walker & Owen, PLLC, by Sam McGee; and The Law Office of James Scott Farrin, by Gary W. Jackson and J. Bryan Boyd, for plaintiff-appellants.

Joshua H. Stein, Attorney General, by Ryan Y. Park, Solicitor General, and Marc Bernstein, Special Deputy Attorney General, for defendant-appellees.

The McGuinness Law Firm, by J. Michael McGuinness; and North Carolina Association of Educators, by Verlyn Chesson Porte, for amicus curiae North Carolina Association of Educators.

The Sumwalt Group, by Vernon Sumwalt; and AARP Foundation, by Ali Naini, for amicus curiae AARP and AARP Foundation.

EARLS, Justice.

¶ 1 In this case, a class of more than 220,000 former State employees (the Retirees) sued the State of North Carolina and various officials and agencies (the State) after the General Assembly enacted a statute that eliminated their option to remain enrolled in a premium-free preferred provider organization health insurance plan which allocated eighty percent of the costs of health care services to the insurer and twenty percent to the insured (the 80/20 PPO Plan). According to the Retirees, the State had undertaken a contractual—and thus constitutional—obligation to provide them with the option to remain enrolled in the 80/20 PPO Plan or one of equivalent value, on a noncontributory basis, for life. In response, the State argues that it never promised the Retirees the benefit of lifetime enrollment in any particular premium-free health insurance plan and that, even if it had done so, the noncontributory plan the State continues to offer provides the Retirees with a benefit of the same or greater value than the one available to them prior to 2011, when the statute eliminating the noncontributory 80/20 PPO Plan option was enacted (the 2011 Act).

¶ 2 The trial court agreed with the Retirees and entered partial summary judgement in their favor. A unanimous panel of the Court of Appeals reversed and remanded for entry of summary judgment in favor of the State. *See Lake v. State Health Plan for Tchrs. & State Emps.*, 264 N.C. App. 174, 189 (2019). On discretionary review before this Court, we must answer a threshold question that divided the lower tribunals and which the parties vigorously contest: Did the State assume a contractual obligation to provide the Retirees the benefit of lifetime enrollment in the premium-free 80/20 PPO Plan or its substantive equivalent, such that the Retirees possessed a constitutionally protected vested right?

¶ 3 This Court has stated and reaffirmed that "[a] public employee has a right to expect that the retirement rights bargained for in exchange for his loyalty and continued services, and continually promised him over many years, will not be removed or diminished." *Bailey v. State*, 348 N.C. 130, 141 (1998) (quoting *Simpson v. N.C. Local Gov't Emps.' Ret. Sys.*, 88 N.C. App. 218, 224 (1987), *aff'd per curiam*, 323 N.C. 362 (1988)). We have recognized that this right protects state employees' pensions and also encompasses other forms of benefits. *See, e.g.*, *N.C. Ass'n of Educators v. State*, 368 N.C. 777 (2016) (NCAE) (holding that teachers possessed a protected right in their status as "career teachers"). It is understandable that the Retirees—who, before 2011, were eligible to remain enrolled in the 80/20 PPO Plan without paying a premium—would perceive being required to pay a premium to remain enrolled in the 80/20 PPO Plan as diminishing their bargained-for rights. For the reasons explained below, we agree with the trial court that the Retirees enjoyed a constitutionally protected vested right in remaining enrolled in the 80/20 PPO Plan or its substantive equivalent on a noncontributory basis.

¶ 4 Nonetheless, the Retirees are entitled to receive only the benefit of the bargain they struck with the State and nothing more. To prevail on their claims arising under Article I, Section 10 of the United States Constitution (the Contracts Clause), the Retirees must also demonstrate that the General Assembly "substantially impaired" their contractual rights when it eliminated the option of enrolling in the premium-free 80/20 PPO Plan. *Bailey*, 348 N.C. at 151. And even if the Retirees meet this burden, the State must be afforded the opportunity to show that the impairment was "reasonable and necessary to serve an important public purpose" and was thus not in violation of the Contracts Clause. *Id.* at 141 (citing *U.S. Tr. Co. of N.Y. v. New Jersey* (*U.S. Trust*), 431 U.S. 1 (1977)).

¶ 5 These latter two questions—whether a contract has been "substantially impaired" and whether any such impairment is "reasonable and necessary"—are particularly fact-intensive. Answering them requires a

careful examination of the plans made available to the Retirees when their respective rights to health insurance coverage vested and a comparison of those plans to the ones the State currently offers. Although the 2011 Act plainly requires the Retirees to pay a premium to remain enrolled in a plan previously offered on a noncontributory basis, many variables besides a premium—such as the size of a plan member's deductibles and co-pays, and the scope of coverage the plan affords—affect the value of a health insurance plan. Furthermore, in a rapidly changing world of dramatic medical advances and evolutions in how health care is financed, including changes to the State's overall health insurance offerings that provide new options for retired state employees, it would be unreasonable to expect that the State would maintain the precise terms of the plans it offered in an entirely different era.

¶ 6 Accordingly, we hold that the trial court correctly determined there were no genuine issues of material fact relating to whether the Retirees possessed a vested right protected under the Contracts Clause. The trial court correctly concluded that the Retirees had obtained such a right. Therefore, the Court of Appeals erred in concluding that the Retirees possessed no vested rights within the meaning of the Contracts Clause. But numerous genuine issues of material fact needed to be resolved in order to answer the latter two questions—whether the 2011 Act worked a substantial impairment of the Retirees' vested rights and whether any such impairment was reasonable and necessary. Thus, the trial court erred in summarily concluding as a matter of law on the record before it that the General Assembly violated the Retirees' state or federal constitutional rights. Accordingly, we affirm the Court of Appeals' decision to reverse the trial court's grant of partial summary judgment in favor of the Retirees, reverse the Court of Appeals' decision to remand this case for entry of summary judgment in favor of the State, and remand this matter to the trial court for further proceedings not inconsistent with this opinion, including our holding that the Retirees possess a vested right.

I. Background

A. Health insurance benefits for retired state employees.

¶ 7 In 1972, the State of North Carolina began offering all state employees and retirees the opportunity to enroll in a health insurance plan. Act of July 20, 1971, ch. 1009, 1971 N.C. Sess. Laws 1588. Initially, the State provided coverage via group insurance contracts it purchased on its employees' behalf. *Id.* § 1 at 1588. In 1982 the General Assembly altered this approach when it established a "Comprehensive Major Medical Plan" offered directly by the State. Act of June 23, 1982, ch. 1398, § 6, 1981

N.C. Sess. Laws (Reg. Sess. 1982) 288, 289-311 (Establishing Act). The Establishing Act codified the Major Medical Plan's terms of coverage and provided that members would be "eligible for coverage under the Plan[ ] on a noncontributory basis." *Id.* at 295. The plan was to be overseen by a Board of Trustees housed within the Office of State Budget and Management, *id.* at 298 (enacting N.C.G.S. § 135-39 (1982)), who were directed to contract with and supervise an outside entity selected by the State Budget Officer to serve as the Plan Administrator, *id.* at 290-91 (enacting N.C.G.S. §§ 135-39.4 to -39.5A (1982)). A few years later, the General Assembly enacted another statute providing that, going forward, retired employees would need to have been employed by the State for at least five years before becoming eligible to receive benefits under the Major Medical Plan. Act of Aug. 14, 1987, ch. 857, § 9, 1987 N.C. Sess. Laws 2098, 2101.

¶ 8 In 2005 the General Assembly enacted a law providing state employees and retirees with the option of enrolling in various PPO plans, while continuing to offer the option of enrolling in the Major Medical Plan. Act of Aug. 13, 2005, ch. 276 § 29.33(a), 2005 N.C. Sess. Laws 1003. The General Assembly also increased the eligibility requirements for new hires to participate in noncontributory retirement health insurance plans from five years of service to twenty years, although the change was only made applicable prospectively. S.L. 2006-174, § 1, 2005 N.C. Sess. Laws (Reg. Sess. 2006) 630, 630. Effective in 2008, the State discontinued the Major Medical Plan it had offered since 1982 and replaced it with a State Health Plan for Teachers and State Employees. Current Operations and Capital Improvements Appropriations Act of 2007, S.L. 2007-323, § 28.22A(a)-(b), 2007 N.C. Sess. Laws 616, 892. By this time, the State was also offering two premium-free PPO plans—the 80/20 PPO Plan[1] and a 70/30 PPO Plan.

¶ 9 In 2011, the General Assembly authorized the State Health Plan[2] to charge employees and retirees a monthly premium to enroll in the 80/20 PPO Plan. S.L. 2011-85, § 1.2(a), 2011 N.C. Sess. Laws 119, 120 (the 2011

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1. The Retirees refer to the Major Medical Plan as the "Regular State Health Plan" and contend that the premium-free 80/20 PPO Plan was its "continuation." Put another way, they argue that the State satisfied its obligation to offer a premium-free health insurance plan of equivalent value to the initial Major Medical Plan (or Regular State Health Plan) until the General Assembly eliminated the option of enrolling in the premium-free 80/20 PPO Plan.

2. The phrase "the State Health Plan" refers both to the package of health benefits offered to State employees and retirees and to the agency that manages those benefits. *See* N.C.G.S. § 135-48.1(14) (2021).

Act). The General Assembly did not eliminate the option for retirees to enroll in a noncontributory health insurance plan—the State continued to offer retirees the option of participating in the premium-free 70/30 PPO Plan. However, retirees who had previously been enrolled in the premium-free 80/20 PPO Plan were required to either pay a premium to remain in their same plan or choose a different premium-free plan containing different terms and, the Retirees assert, offering a less valuable benefit. *See id.*

B. Trial court proceedings.

¶ 10 In response to the 2011 Act, the Retirees filed suit on behalf of themselves and all other similarly situated former state employees against the State Health Plan for Teachers and State Employees, the Teachers' and State Employees' Retirement System and its trustees, the State Treasurer, and the State of North Carolina. They alleged claims for breach of contract, unconstitutional impairment of contracts in violation of the Contracts Clause, and unconstitutional violation of their rights to due process and equal protection under article I, section 19 of the North Carolina Constitution (the Law of the Land Clause). They sought (1) a writ of mandamus requiring the State to "reinstate and continue" the premium-free 80/20 PPO Plan for all class members, or a preliminary and permanent injunction requiring the same; (2) declaratory relief; and (3) the creation of a trust or common fund for the payment of damages. The State initially moved to dismiss the complaint on the basis of sovereign immunity. After the trial court denied that motion, the State appealed. The Court of Appeals affirmed, holding that the Retirees "sufficiently alleged a valid contract between them and the State in their complaint to waive the defense of sovereign immunity." *Lake v. State Health Plan for Tchrs. & State Emps.*, 234 N.C. App. 368, 375 (2014).

¶ 11 On remand, the trial court certified a class composed of:

> (1) All members (or their Estates or personal representatives if they have deceased since July 1, 2009) of the N.C. Teachers' and State Employees' Retirement System ("TSERS") who retired before January 1, 1988; (2) TSERS members (or their Estates or personal representatives if they have deceased since July 1, 2009) who retired on or after January 1, 1988, were hired before October 1, 2006 and have 5 or more years of contributory service with the State and (3) surviving spouses (or their Estates or personal representatives if they have deceased since July 1, 2009) of

> (i) deceased retired employees, provided the death of the former plan member occurred prior to October 1, 1986; and (ii) deceased teachers, State employees, and members of the General Assembly who are receiving a survivor's alternate benefit under any of the State-supported retirement programs, provided the death of the former plan member occurred prior to October 1, 1986

All class members were either former employees who had become eligible to enroll in a premium-free State health insurance plan upon retirement because they satisfied the eligibility requirements in existence when they were hired or those deceased employees' beneficiaries.[3] The parties proceeded to discovery.

¶ 12 On 14 September 2016, the Retirees filed a motion for partial summary judgment. They alleged that "[t]he [State's] own documents and testimony prove that they offered the Retiree Health Benefit as a lifetime contractual benefit 'earned' through a defined period of employment service." In support of their motion, the Retirees relied on depositions of class members as well as former State benefits counselors, the Executive Director and Deputy Director for the State Health Plan, the Director of the Fiscal Research Division of the North Carolina General Assembly and its pension analyst, the Deputy Director of Operations for the State Retirement System, actuaries for the State Health Plan, a representative of the health insurance plan administrator (Blue Cross Blue Shield of North Carolina), and the then-serving elected North Carolina State Treasurer. They also relied on statements in legislation governing the State Health Plan, press releases pertaining to the State Health Plan, training manuals used by customer service personnel to advise State employees and retirees, benefits handbooks provided to State employees and retirees, and presentations regarding the State Health Plan's fiscal outlook.

¶ 13 The undisputed evidence elicited from these sources and presented in support of the Retirees' summary judgment motion included descriptions of retirement health insurance coverage as a part of their "total package of compensation"; explanations that employees would become

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3. Notably, the class only includes retirees who would have satisfied the eligibility requirements for enrolling in the premium-free Major Medical Plan or subsequent 80/20 PPO Plan prior to the 2011 Act taking effect. This case only addresses changes applied retroactively to the health insurance options available to retirees already eligible to enroll in the plan the 2011 Act eliminated. The Retirees do not challenge the State's authority to change its employment benefit offerings prospectively.

eligible for "noncontributory (no cost to you)" health insurance coverage upon retirement and "for life" after working for the State for at least five years; statements that employees would be eligible for retiree health coverage "for life" when they "vested"; descriptions of the State's "liability" arising from its ongoing "obligation" to continue paying the premiums for retirees who had "already earned" the right to enroll in the State Health Plan on a noncontributory basis; and class members' own statements that they relied on the promise of lifetime enrollment in a premium-free health insurance plan when deciding to accept or continue in employment with the State.

¶ 14 In response, the State filed its own motion for summary judgment as to liability in which it argued that the evidence presented by the Retirees demonstrated that "[t]he State never undertook, nor was any state agency authorized, to offer Plaintiffs any such contracts. . . . that would lock-in any terms of the [State Health] Plan for fifty-plus years into the future." The State further contended that even if the Retirees had established the existence of some contractual right to remain enrolled in a health insurance plan of a particular value, the Retirees' assertion that the premium-free 70/30 PPO Plan was substantially less valuable than the premium-free 80/20 PPO Plan "fail[ed] to address the terms of a complete and enforceable contract for healthcare benefits," given that "[c]oinsurance is one of many healthcare terms and it accounts for only a fraction of healthcare costs."

¶ 15 On 19 May 2017, the trial court entered an Order Granting Plaintiffs' Motion for Partial Summary Judgment and Denying Defendants' Motion for Summary Judgment as to Liability. The trial court found as a factual matter that the State had promised its employees the benefit of enrolling in a plan at least as valuable as the premium-free 80/20 PPO Plan as part of their overall compensation package, that these employees relied on this promise, and that the promised benefit formed "a part of the contract between Class Members and the Defendants." Accordingly, the trial court determined that the Retirees' employment contracts with the State gave rise to "an entitlement to a non-contributory (premium-free) health plan equivalent to the 80/20 regular state health plan that had long been offered and provided to Class Members." The trial court further concluded that the 2011 Act eliminating the premium-free 80/20 PPO Plan "substantially impaired the[se] contracts" because the only noncontributory option thereafter available to the Retirees was the 70/30 PPO Plan. Finally, the court concluded that the State's action "was neither reasonable nor necessary to serve an important public purpose." As a result, the trial court concluded that the 2011 Act violated both the

federal Contracts Clause and the state Law of the Land Clause. The State again appealed.

C. The Court of Appeals' decision.

¶ 16 On appeal, the Court of Appeals unanimously reversed and remanded for the entry of summary judgment in favor of the State. *Lake v. State Health Plan for Tchrs. & State Emps.*, 264 N.C. App. 174 (2019).

¶ 17 The Court of Appeals began with the Retirees' claim that the 2011 Act violated the Contracts Clause, which provides in relevant part that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10. According to the Court of Appeals, Contracts Clause claims are governed by a three-part test articulated by the United States Supreme Court in *United States Trust Co. of New York v. New Jersey* (*U.S. Trust*), 431 U.S. 1 (1977), and subsequently adopted by this Court. Under the *U.S. Trust* test, a court must "ascertain: (1) whether a contractual obligation is present, (2) whether the state's actions impaired that contract, and (3) whether the impairment was reasonable and necessary to serve an important public purpose." *Lake*, 264 N.C. App. at 179–80 (quoting *Bailey*, 348 N.C. at 141). The Court of Appeals concluded that the Retirees' claims failed the first prong of the *U.S. Trust* test: they could not demonstrate that the State had undertaken a "specific contractual financial obligation" to continue providing the 80/20 PPO Plan on a noncontributory basis. *Id.* at 189.

¶ 18 To determine if any contractual right existed, the Court of Appeals compared the Retirees' asserted right to health insurance coverage with the pension benefits this Court held protected by the Contracts Clause in *Bailey*. According to the Court of Appeals, pension benefits were granted the status of a constitutionally protected "vested contractual right because they were a form of 'deferred compensation.' " *Id.* at 181 (quoting *Bailey*, 348 N.C. at 141). By contrast, the "benefit" of being eligible to enroll in a particular health insurance plan was categorically different. Whereas pension benefits are funded through "mandatory" deductions "from the employee's paycheck" and are "calculated based upon the employee's salary and length of service," state employees "are not required to" contribute anything to become eligible to enroll in a premium-free health insurance plan. *Id.* at 182. Additionally, "the level of retirement health care benefits is not dependent upon an employee's position, retirement plan, salary, or length of service. All eligible participants, active and retired, have equal access to the same choices in health care plans." *Id.* Thus, health insurance benefits and pension benefits are "[n]ot [a]nalogous." *Id.* at 181.

¶ 19 The Court of Appeals next examined the statutes governing the State Health Plan to determine if the General Assembly had evinced an express intent to undertake a contractual obligation. The Court of Appeals noted that "[t]he statutes governing the State Health Plan do not refer to a 'contract' between the employees and the State," even though "[t]he term 'contract' is used in the statute to describe the relationship between the State Health Plan and its service providers." *Id.* at 185. Moreover, the Court of Appeals found it salient that the General Assembly had, on numerous occasions, exercised its statutorily reserved right to "alter" the State Health Plan by changing its terms, which the court concluded "support[s] a holding that the establishment and maintenance of the North Carolina State Health Plan is a legislative policy, which is 'expressly and, inherently subject to revision and repeal' by the General Assembly." *Id.* at 187 (quoting *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 466 (1985)). The Court of Appeals concluded that the Retirees had failed to overcome the "presumption" against construing statutes "to create contractual rights in the absence of an expression of unequivocal intent." *Id.* at 180–81.

¶ 20 The Court of Appeals also rejected the Retirees' effort to prove the State's intent to contract by looking to statements in "pamphlets, distributed by the State to its employees to explain the retirement benefits." *Id.* at 185. The Court of Appeals stated that this kind of extrinsic evidence was relevant only in cases involving "mandatory and contributory retirement benefits." *Id.* It reasoned that the General Assembly's "use of contractual language in the statute in reference to service providers indicates the General Assembly specified situations and knew when to use the word 'contract,' and it did not intend to form a contractual relationship between the State and its employees related to health care insurance benefits." *Id.* at 186.

¶ 21 Having concluded that the Retirees had failed to demonstrate the existence of any vested right in a premium-free 80/20 PPO Plan or its substantive equivalent, the Court of Appeals determined that the Retirees' Contracts Clause argument necessarily failed. *Id.* at 188. For the same reason, the Court of Appeals overruled the trial court's conclusion that the 2011 Act "violated Article I, section 19 of the Constitution [by] tak[ing] Plaintiffs' private property without just compensation. . . . Without a valid contract, Plaintiffs' state constitutional claims also fail." *Id.* (citing *Adams v. State*, 248 N.C. App. 463, 469–70 (2016), *disc. rev. denied*, 370 N.C. 80 (2017)). Accordingly, the court "reverse[d] the grant of partial summary judgment and remand[ed] for entry of summary judgment in favor of Defendants and dismissal of Plaintiffs' complaint." *Id.* at 189.

¶ 22 Plaintiffs filed a Petition for Discretionary Review and Writ of Certiorari on 9 April 2019. This Court allowed discretionary review in an order dated 26 February 2020.[4]

II. Standard of Review

¶ 23 "When the party bringing the cause of action moves for summary judgment, he must establish that all of the facts on all of the essential elements of his claim are in his favor. . . ." *Steel Creek Dev. Corp. v. James*, 300 N.C. 631, 637 (1980). The movant "must show that there are no genuine issues of fact; that there are no gaps in his proof; that no inferences inconsistent with his recovery arise from his evidence; and that there is no standard that must be applied to the facts by the jury." *Kidd v. Early*, 289 N.C. 343, 370 (1976). This Court reviews a grant of summary judgment de novo. *Charlotte-Mecklenburg Hosp. Auth. v. Talford*, 366 N.C. 43, 47 (2012). In undertaking de novo review, we consider the affidavits, depositions, exhibits, and other submissions of the parties to determine if the material facts are uncontested and whether there is a genuine issue for trial. *See, e.g.*, *Dobson v. Harris*, 352 N.C. 77, 83 (2000) (citing *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518 (1972)).

¶ 24 In this case both parties moved for summary judgment on the merits. Nevertheless, as we explained in *Dobson*,

> [s]ummary judgment is properly granted when the forecast of evidence reveals no genuine issue as to any material fact, and when the moving party is entitled to a judgment as a matter of law. . . . The movant's papers are carefully scrutinized . . . those of the adverse party are indulgently regarded. All facts asserted by the adverse party are taken as true, and their inferences must be viewed in the light most favorable to that party.

352 N.C. at 83 (cleaned up). Thus, even though both parties in this case asserted that there were no disputes of material fact and that they were

4. By order dated 18 August 2021 this Court, mindful of the quorum requirement of N.C.G.S. § 7A-10(a), invoked the Rule of Necessity to decide this matter in light of the fact that a majority of the members of the Court have one or more persons within the third degree of kinship by blood or marriage not residing in their households who could be plaintiff class members. *See, e.g.*, *Boyce & Isley, PLLC v. Cooper*, 357 N.C. 655, 655–56 (2003) (invoking the Rule of Necessity to permit the making of a decision to grant or deny a petition for discretionary review in an important case by more than a bare quorum of the Court); *Long v. Watts*, 183 N.C. 99, 102–03 (1922) (determining that the Court must hear a case challenging the application of a statewide income tax to judicial salaries despite the potential effect of that case upon the members of the Court).

entitled to judgment as a matter of law, if our review of the evidence submitted at summary judgment reveals a genuine material factual dispute, we must remand to the trial court. *See Forbis v. Neal*, 361 N.C. 519, 530–31 (2007) (remanding after review of cross-motions for summary judgment).

III The Federal Contracts Clause Claim

¶ 25 The Court of Appeals correctly stated the legal framework applicable to claims arising under the Contracts Clause of the United States Constitution. As we have explained, when "determining whether a contractual right has been unconstitutionally impaired, we are guided by the three-part test set forth in *U.S. Trust Co. of N.Y. v. New Jersey*." *Bailey*, 348 N.C. at 140. This test requires us to "ascertain: (1) whether a contractual obligation is present, (2) whether the state's actions impaired that contract, and (3) whether the impairment was reasonable and necessary to serve an important public purpose." *Id.* at 141. An impairment only implicates the Contracts Clause if it is "substantial" as opposed to "[m]inimal." *Id.* at 151 (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244–45 (1978)). We apply this familiar "tripartite test" in analyzing the Retirees' claim. *Simpson v. N.C. Local Gov't Emps.' Ret. Sys.*, 88 N.C. App. 216, 224 (1987), *aff'd per curiam*, 323 N.C. 362 (1988).

A. Relevant North Carolina precedents interpreting and applying the *U.S. Trust* test.

¶ 26 This Court has interpreted and applied the *U.S. Trust* test to determine whether state employees or retirees possessed a vested right to an employment benefit on numerous occasions. At its core, this case centers on the proper interpretation of four of those cases: *Simpson v. North Carolina Local Government Employees' Retirement System*, 88 N.C. App. 218 (1987), *aff'd per curiam*, 323 N.C. 362 (1988); *Faulkenbury v. Teachers' & State Employees' Retirement System of North Carolina*, 345 N.C. 683 (1997), *Bailey v. State*, 348 N.C. 130 (1998), and *North Carolina Association of Educators v. State*, 368 N.C. 777 (2016) (*NCAE*). According to the Retirees, these cases establish a universal framework for assessing when state employees obtain a vested right in any kind of employment benefit. According to the State, these cases explain why statutes providing *pension* benefits create vested rights; however, the State asserts that the reasons justifying this Court's treatment of pension benefits do not pertain to the kind of claimed health insurance benefits at issue here.

¶ 27 We agree with the Retirees, to an extent. Collectively, *Simpson*, *Faulkenbury*, *Bailey*, and *NCAE* establish that a state employee can

obtain a vested right in an employment benefit that is not a pension and that treatment of a benefit as a contractual right does not depend on how closely that benefit resembles a pension. These cases further illustrate that the State may assume a contractual obligation to provide a benefit even if the statute creating the benefit "did not itself create any vested contractual rights." *NCAE*, 368 N.C. at 789. Because many of the issues in this case were examined in these four prior cases, we begin with a brief review of these precedents.

1. Simpson v. Local Government Employees' Retirement System.

¶ 28 In *Simpson*, two firefighters who were vested members of the North Carolina Local Governmental Employees' Retirement System challenged a law modifying how disability retirement benefits were calculated. 88 N.C. App. at 219–21. As a result of the General Assembly's actions, the firefighters would "receive, upon disablement after vesting, a smaller retirement allowance under the modified statute than under prior law." *Id.* at 220. The firefighters claimed that the decrease "constitute[d] an impairment of contractual rights" in violation of the Contracts Clause of the United States Constitution. *Id.* at 221. The Court of Appeals agreed, and this Court affirmed per curiam.

¶ 29 According to the Court of Appeals, "the relationship between plaintiffs and the Retirement System is one of contract." *Id.* at 223. In support of this holding, the Court of Appeals identified two related but distinct justifications for characterizing the plaintiffs' disability benefits as vested contractual rights:

> If a pension is but deferred compensation, already in effect earned, merely transubstantiated over time into a retirement allowance, then an employee has contractual rights to it. *The agreement to defer the compensation is the contract. Fundamental fairness also dictates this result.* A public employee has a right to expect that the retirement rights bargained for in exchange for his loyalty and continued services, and continually promised him over many years, will not be removed or diminished.

Id. at 223–24 (emphasis added). The firefighters had vested rights in their pension benefits because (1) they earned the benefits as compensation while they were working and deferred receipt until retirement, and (2) the promise of disability retirement benefits allocated in a particular way was part of the bargain they struck with the State when they

entered into an employment contract. *Id.* Notably, the Court of Appeals pointedly rejected the State's argument that the General Assembly's inclusion of a "right-to-amend" clause in the statute providing benefits to the firefighters defeated the firefighters' claim.[5] *Id.* at 221.

¶ 30 Next, without analysis, the Court of Appeals concluded that the challenged law substantially impaired the firefighters' vested rights "inasmuch as plaintiffs stand to suffer significant reductions in their retirement allowances as a result of the legislative amendment under challenge." *Id.* at 225. But the Court of Appeals concluded that a "genuine issue[ ] [remained] as to a[ ] material fact in this action," namely, whether the State had demonstrated that the legislative changes to the retirement plan were "reasonable *and necessary* to serve an important state interest." *Id.* at 226. Accordingly, the Court of Appeals held that summary judgment for the State had been "improvidently entered" and remanded the case to the trial court for further proceedings. *Id.*

2. Faulkenbury v. Teachers' & State Employees' Retirement System of North Carolina.

¶ 31 In *Faulkenbury* we considered whether a statute "which reduced plaintiffs' disability retirement payments[ ] violates Article I, Section 10 of the Constitution of the United States." 345 N.C. at 690. Noting that the case was "almost on all fours with" *Simpson*, we affirmed "that the relation between the employees and the governmental units was contractual." *Id.* Because "[a]t the time the plaintiffs' rights to pensions became vested, the law provided that they would have disability retirement benefits calculated in a certain way," we concluded that "[t]hese were rights [the plaintiffs] had earned and that may not be taken from them by legislative action." *Id.*

¶ 32 After declining the defendants' invitation to overrule *Simpson*, we considered and rejected various arguments purporting to explain why the plaintiffs lacked a contractual right in disability benefits calculated in the manner provided at the time their benefits vested. We expressly rejected the argument that the plaintiffs' rights were not contractual because "the statutes upon which the plaintiffs rely . . . only state a policy which the General Assembly may change." *Id.* Instead, we concluded that these statutes "provided what the plaintiffs' compensation in the

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5. For reasons explained more fully below, given the fact that *Simpson* established that a statutory provision containing a right-to-amend clause could give rise to contractual benefits, it was not unreasonable for the Retirees to believe that the statutory provisions granting retirement health insurance coverage could give rise to contractual benefits notwithstanding the legislature's inclusion of a right-to-amend clause.

way of retirement benefits would be" at the time the plaintiffs "started working for the state." *Id.* Thus, when the plaintiffs accepted their offers of employment and subsequently vested in the retirement system, the statutes outlining disability benefits became part of their contracts. *Id.*

¶ 33 We reached this conclusion notwithstanding our recognition that "nothing in the statutes" indicated the General Assembly "intended to offer the benefits as a part of a contract." *Id.* at 691. Instead of restricting our analysis to the four corners of the statute, we considered how a reasonable person offered employment with the State would interpret what the benefits provided by the statute represented:

> [W]hen the General Assembly enacted laws which provided for certain benefits to those persons who were to be employed by the state and local governments and who fulfilled certain conditions, this could reasonably be considered by those persons as offers by the state or local government to guarantee the benefits if those persons fulfilled the conditions. When they did so, the contract was formed.

Id. We concluded it was reasonable for a prospective employee to believe the statutes providing retirement disability benefits were part of the compensation package promised, even though these statutes provided that the General Assembly "reserved the right to amend the retirement plans for state and local government employees." *Id.*

¶ 34 Regarding the second prong of the *U.S. Trust* test, we reasoned that even if other changes to the plaintiffs' overall retirement benefits meant they were "receiving more than any reasonable expectation they had for disability benefits," the plaintiffs were "entitled to what they bargained for when they accepted employment with the state and local governments. They should not be required to accept a reduction in benefits for other benefits they have received." *Id.* at 693. Regarding the third prong, we rejected the defendants' argument that the changes were "reasonable and necessary to accomplish [the] important public purpose" of discouraging employees from "tak[ing] early retirement." *Id.* at 693–94. Accordingly, we held that the statute changing how retirement benefits were calculated violated the Contracts Clause. *Id.* at 694.

3. Bailey v. State.

¶ 35 In *Bailey* a class of state and local government employees challenged a state law capping the amount of retirement benefits that were exempted from state taxation at $4,000. 348 N.C. at 139. Prior to the

law, all benefits paid out to retirees under any state or local retirement system were entirely tax-exempt. *Id.* Every member of the class had " 'vested' in the retirement system" before the law took effect, meaning they had met "the requirement that employees work a predetermined amount of time in public service before [becoming] eligible for retirement benefits." *Id.* at 138. Ultimately, we agreed with the plaintiffs that they had "a contractual right to an exemption of their benefits from state taxation that has been impaired by the Act." *Id.* at 139.

¶ 36 Once again, the defendants invited this Court to overrule *Simpson*. Once again, we declined. *Id.* at 142 ("[T]he contractual relationship approach taken by the Court of Appeals in *Simpson* and our subsequent decisions is the proper one."). Instead, we affirmed the underlying principle that North Carolina law has "long demonstrated a respect for the sanctity of private and public obligations from subsequent legislative infringement." *Id.* We explained that "[t]his respect for individual rights has manifested itself through the expansion of situations in which courts have held contractual relationships to exist, and in which they have held these contracts to have been impaired by subsequent state legislation." *Id.* at 143. We noted that this principle has been extended to cases protecting vested rights that were not created by statute. *Id.* at 144 (citing *Pritchard v. Elizabeth City*, 81 N.C. App. 543, *disc. rev. denied*, 318 N.C. 417 (1986)). Indeed, we explained that "[t]he basis of the contractual relationship determinations in these and related cases is the principle that where a party in entering an obligation *relies on the State*, he or she obtains vested rights that cannot be diminished by subsequent state action." *Id.* (emphasis added). The employees' "expectational interests upon which [they] have relied through their actions" in entering into and maintaining employment with the State were the source of the vested right "safeguarded by the Contract Clause protection." *Id.* at 144–45.

¶ 37 With respect to the first prong of the *U.S. Trust* test, we framed the question as "whether the tax exemption was a condition or term included in the retirement contract." *Id.* at 146. We found dispositive the trial court's finding of fact that "[a] reasonable person would have concluded from the totality of the circumstances and communications made to plaintiff class members that the tax exemption was a term of the retirement benefits offered in exchange for public service to state and local governments." *Id.* Moreover, we concluded that this finding was amply supported by the evidence produced at trial, including the

> creation of various statutory tax exemptions by the legislature, the location of those provisions alongside the other statutorily created benefit terms instead of

> within the general income tax code, the frequency of governmental contract making, communication of the exemption by governmental agents in both written and oral form, use of the exemption as inducement for employment, mandatory participation, reduction of periodic wages by contribution amount (evidencing compensation), loss of interest for those not vesting, establishment of a set time period for vesting, and the reliance of employees upon retirement compensation in exchange for their services.

Id. Based on this finding and the supporting evidence, we concluded that "in exchange for the inducement to and retention in employment, the State agreed to exempt from state taxation benefits derived from employees' retirement plans." *Id.* at 150. This was a sufficient basis for us to hold that "the right to benefits exempt from state taxation is a term of [every eligible State employee's] contract" with the State. *Id.*

¶ 38 After rejecting the defendants' arguments that other statutes and constitutional provisions forbade the State from entering into a contract to provide a tax exemption, we held that the plaintiffs had also satisfied the second and third prongs of the *U.S. Trust* test. With respect to the second prong, we concluded that the imposition of a $4,000 annual exemption cap—which would produce "losses to retirees in expected income . . . in excess of $100 million"—was a substantial impairment of the employees' contractual right to tax-exempt retirement benefits. *Id.* at 151. With respect to the third prong, we rejected the State's effort to justify the $4,000 cap as a "reasonable and necessary" means to equalize the tax treatment of state and federal retirement benefits, as was required under a recent United States Supreme Court decision. *Id.* at 152 (citing *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803 (1989)). We held that the $4,000 cap "was not *necessary* to achieve the state interest asserted" because the State could have equalized the tax treatment of state and federal retirement benefits in "numerous ways . . . without impairing the contractual obligations of plaintiffs." *Id.* (emphasis added). We held that the impairment was "not *reasonable* under the circumstances" merely because the impairment would allow the General Assembly to comply with *Davis* by enacting "revenue neutral" legislation. *Id.* (emphasis added). Accordingly, we concluded that the law capping state retirement benefits tax exemptions for the plaintiffs violated the Contracts Clause of the United States Constitution and was an impermissible taking under the Law of the Land Clause of the North Carolina Constitution.

4. North Carolina Association of Educators v. State.

¶ 39 Finally, in *NCAE* a class of North Carolina public school teachers claimed that the General Assembly violated both the Contracts Clause and the Law of the Land Clause when it enacted a statute eliminating North Carolina's career status system, "creat[ing] a new system of employment," and "retroactively revok[ing] the career status of teachers who had already earned that designation." 368 N.C. at 779. Under the career status system, teachers who had been employed for a statutorily fixed number of years became eligible to enter into a "career teacher" contract with the teacher's local school board; having attained career status, the teacher would "no longer [be] subject to an annual appointment process and could only be dismissed for . . . grounds specified [by] statute." *Id.* (internal citation omitted). This Court concluded that the law eliminating career status was unconstitutional "to the extent that the Act retroactively applies to teachers who had attained career status as of" the date the change took effect. *Id.*

¶ 40 Once again, the Court turned to the three-prong *U.S. Trust* test. To determine if the State had undertaken a contractual obligation to maintain the career status system, the Court first considered "whether any contractual obligation arose from the statute making up the now-repealed Career Status Law." *Id.* at 786. Noting the "presumption" against construing state statutes to create private contractual or vested rights, *id.*, the Court concluded that the law itself was not the source of any such rights, *id.* at 788. In reaching this conclusion, the Court found it "critical" that the legislature had chosen not to use the word contract in the Career Status Law. *Id.* at 787.

¶ 41 Nonetheless, the Court explained that there were other ways to prove the existence of a vested right. The first was through a statute providing benefits in the form of deferred compensation. In these circumstances "vested contractual rights were created by the statutes at issue because, at the moment the plaintiffs fulfilled the conditions set out in the two benefits programs, the plaintiffs earned those benefits." *Id.* at 788. This scenario did not describe the statutes creating the career status system because teachers who met the eligibility requirements for becoming a career teacher did not automatically become a career teacher; rather, they needed to "enter a career contract with the school board." *Id.* Accordingly, the Court held that "the Career Status Law did not itself create any vested contractual rights." *Id.* at 789.

¶ 42 Yet the Court's analysis "d[id] not end here." *Id.* Instead, the Court explained that "[l]aws which subsist at the time and place of the making

of a contract . . . enter into and form a part of it, as if they were expressly referred to or incorporated in its terms." *Id.* at 789 (second alteration in original) (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 429–30 (1934)). When teachers entered into contracts with local school boards to become career teachers, the "statutory system that was in the background of the contract between the teacher and the board set out the mechanism through which the teachers could obtain career status." *Id.* After the teacher "complet[ed] several consecutive years as a probationary teacher and then receiv[ed] approval from the school board," the teacher's contractual right to career status protections "vested." *Id.* "At that point, the General Assembly no longer could take away that vested right retroactively in a way that would substantially impair it." *Id.* Thus, we concluded that "vesting stems not from the Career Status Law, but from the teacher's entry into an individual contract with the local school system." *Id.*

¶ 43 In support of this conclusion, the Court relied on evidence in the record indicating that the opportunity to attain career status was offered to teachers as part of the compensation package used to attract them to public sector employment and that teachers considered the benefit to be an important incentive to remain in their positions. *Id.* (stating that the record "demonstrates the importance of those protections to the parties and the teachers' reliance upon those benefits in deciding to take employment as a public school teacher"). Relying principally on affidavits submitted by the plaintiffs, the Court explained that public school teachers

> were promised career status protections in exchange for meeting the requirements of the law, relied on this promise in exchange for accepting their teacher positions and continuing their employment with their school districts, and consider the benefits and protections of career status to offset the low wages of public school teachers.

Id. at 789–90. Thus, "although the Career Status Law itself created no vested contractual rights, the contracts between the local school boards and teachers with approved career status included the Career Status Law as an implied term upon which teachers relied." *Id.* at 790.

¶ 44 The Court then examined the two remaining prongs of the *U.S. Trust* test. Because the law repealing career status eliminated protections that had previously been afforded to the teachers under the Career Status Law, the Court had no trouble concluding that repeal of the law effected

"a substantial impairment of the bargained-for benefit promised to the teachers who have already achieved career status." *Id.* Addressing the third prong—whether the impairment was "reasonable and necessary"—the Court explained that the burden shifted back to the State to "justify an otherwise unconstitutional impairment of contract" in light of "the interest the State argues is furthered." *Id.* at 791. Although the Court agreed with the State that "maintaining the quality of the public school system is an important purpose . . . [and] that alleviating difficulties in dismissing ineffective teachers might be a legitimate end justifying changes to the Career Status Law, no evidence indicates that such a problem existed." *Id.* Furthermore, the Court could not discern how retroactively repealing career status for all teachers who had already earned it was a "reasonable" way of advancing the State's asserted interest in light of "several alternatives . . . that would allow school boards more flexibility in dismissing low-quality teachers." *Id.* at 792. Accordingly, the Court held that the repeal of the Career Status Law was unconstitutional as applied to teachers who had entered into contracts with school boards which granted them career status protections. *Id.*

B. Whether a contractual obligation is present.

¶ 45 The facts regarding the language chosen by the General Assembly in the statutes creating the State Health Plan, and the language regarding the plan utilized by the State and its agents in communications with employees, retirees, and the public, are not in dispute. The sole question before us in resolving this issue is a legal one: the facts being what they are, do state employees have a vested right in lifetime enrollment in a premium-free health insurance plan offering coverage that is of equivalent or greater value than the plan offered at the time they became eligible to enroll in the State Health Plan on a noncontributory basis? We conclude that they do.

¶ 46 As our precedents illustrate, a state employee can prove the existence of a vested right in numerous ways. An employee can show that the statute conferring a benefit is itself the source of the right. Generally, proving that the statute is itself the source of a right requires an employee to point to language in the statute plainly evincing the General Assembly's intent to undertake a contractual obligation. Based on the uncontested facts, we agree with the State that the Establishing Act is not itself the source of the Retirees' contractual right. The Establishing Act declares that the State "undertakes to *make available* a Comprehensive Major Medical Plan . . . to employees, retired employees, and certain of their dependents," but it stipulates that the State "will pay benefits *in accordance with the terms hereof*." Act of June 23, 1982,

ch. 1398 § 6, 1981 N.C. Sess. Laws (Reg. Sess. 1982) at 292 (emphases added) (enacting N.C.G.S. § 135-40 (1982), repealed by S.L. 2008-168 § 3(b), 2007 N.C. Sess. Laws. (Reg. Sess. 2008) 649, 661)). In addition, the Establishing Act contains a "right-to-amend" clause which expressly reserves to the General Assembly the authority to change the "terms" of coverage. *Id.* Accordingly, the Establishing Act does not expressly indicate an intent to create a contractual obligation to provide health insurance coverage of a certain value.

¶ 47 But state employees can also prove the existence of a vested right by demonstrating that they reasonably relied upon the promise of benefits provided by a statute when entering into an employment contract with the State. *See, e.g.*, *Bailey*, 348 N.C. at 145. If a statute provides benefits in the form of immediate compensation deferred until retirement, then the employee's right to the benefit vests when the contract is formed. *Cf. NCAE*, 368 N.C. at 788 ("Though the benefits would be received at a later time, the plaintiffs' right to receive them accrued immediately, became vested, and a contract was formed between the plaintiffs and the State." (citing *Bailey* and *Faulkenbury*)). By contrast, if a statute provides benefits for which an employee only becomes eligible after certain conditions are met, then the employee's right to the benefit vests when he or she satisfies the relevant eligibility criteria. *Id.* at 788–89.

¶ 48 The Court of Appeals went awry in three important ways when interpreting and applying our Contracts Clause precedents. First, as detailed above, the Court of Appeals ignored our cases recognizing that vested rights can arise even in the absence of a statute demonstrating the General Assembly's express intent to undertake a contractual obligation. As *NCAE* illustrates, vested rights may arise from a source other than an express statutory provision even in circumstances involving benefits that are not pensions. Second, the Court of Appeals overstated the importance of the distinction between pension benefits and other kinds of retirement benefits. Although it is relevant that some of the factors which have led this Court to recognize pension benefits as vested rights are not present with regard to lifetime enrollment in a premium-free health insurance plan, these distinctions do not preclude a finding that public employees obtained a vested right to the latter.[6] Third, the Court

6. For example, it is correct that public employees are required to contribute to and enroll in the pension system but that they can opt out of health insurance coverage. Regardless, even if an employee does not choose to enroll in the State Health Plan, the availability of such a plan to an employee—and the employee's lifetime eligibility to become a plan member—confers a material benefit which could reasonably influence an individual's decision to accept or remain in employment with the State.

of Appeals was wrong to disregard the Retirees' extrinsic evidence regarding the State's communications about the health insurance benefit and what employees reasonably understood that benefit to be. On a different set of facts in which a statute providing benefits unambiguously disclaimed any intent to provide any benefits that could be incorporated into the terms of a contract,[7] the importance of the State's subsequent communications with employees might be diminished. But we are not presented with such a circumstance in this case.

¶ 49 Here, the undisputed evidence establishes that, as the trial court found, "[t]he [State] offered [the Retirees] certain premium-free health insurance benefits in their retirement if they worked for the State . . . for a requisite period of time" and that the "promise" of this benefit was "part of the overall compensation package" state employees reasonably expected to receive in return for their services. The undisputed evidence

> reveals that often the [benefit of lifetime eligibility for premium-free health insurance] was communicated to prospective employees with the intent of inducing individuals to either begin or continue public service employment. Moreover, . . . innumerable communications were made to plaintiff public employees throughout their careers, both orally and in writing (including multiple unequivocal written statements in official publications and employee handbooks) [regarding the availability of the benefit]. . . .

Bailey, 348 N.C. at 138. The undisputed evidence demonstrates that this benefit was an important component of state employees' acceptance of and continuation in employment with the State. *NCAE*, 368 N.C. at 789. These undisputed facts are sufficient to establish the legal proposition

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7. Notably, the General Assembly has enacted statutes containing right-to-amend provisions which explicitly and unmistakably stated that any benefits provided by statute would not be contractual in nature. *See* N.C.G.S. § 135-113 (2021) ("The benefits provided in this Article as applicable to a participant who is not a beneficiary under the provisions of this Article *shall not be considered as a part of an employment contract, either written or implied*, and the General Assembly reserves the right at any time and from time to time to modify, amend in whole or in part or repeal the provisions of this Article."); *see also* N.C.G.S. § 128-38.10(j) (2021) ("The General Assembly reserves the right at any time and, from time to time, to modify or amend, in whole or in part, any or all of the provisions of the QEBA. No member of the Retirement System and no beneficiary of such a member shall be deemed to have acquired any vested right to a supplemental payment under this section."). The fact that the legislature chose *not* to include this kind of explicit clause in the right-to-amend provision at issue here is further support for the conclusion that the Retirees reasonably relied on the State's promise of retirement health insurance coverage.

that a vested right arose from employees' reasonable "expectational interests" and their actions in reliance thereon. *Bailey*, 348 N.C. at 145.

¶ 50 For example, multiple class members testified to the impact the promise of retirement health insurance coverage had on their decision to accept employment with and continue working for the State. As we explained in *NCAE*, such evidence can "demonstrate[ ] the importance of those protections to the parties and the [employees'] reliance upon those benefits in deciding to take [public] employment." 368 N.C. at 789. The State does not meaningfully dispute the fact that class members understood the promise of eligibility to enroll in health care after retirement to be a benefit they earned through their service to the State—indeed, multiple of the defendants or their agents agreed in deposition testimony that they understood themselves to have "*vested* in the retiree health benefit." This undisputed evidence establishes that the promise of health insurance coverage in retirement was "an implied term upon which [the employees] relied." *Id.* at 790.

¶ 51 Of course, one party's reliance does not give rise to a contractual obligation if their reliance is unreasonable. But, in this case, undisputed evidence illustrates that all parties understood the State to have undertaken an obligation to provide continued premium-free health insurance coverage to retirees who had satisfied the statutory eligibility requirements.[8] While this evidence does not prove that the General Assembly acted with an express intent to contract, it demonstrates the reasonableness of the Retirees' belief that lifetime eligibility for enrollment in a premium-free health insurance plan was an inducement to employment and a part of their overall compensation package.

¶ 52 The short title of the final version of the 2006 bill requiring retired employees to have worked for the State for at least twenty years before becoming eligible for noncontributory retirement health insurance benefits was "State Health Plan / 20-Year *Vesting*." S.837 (3d ed.), S.L.

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8. Although the question of whether a party's reliance is reasonable "is ordinarily a question of fact," *Olivetti Corp. v. Ames Bus. Sys., Inc.*, 319 N.C. 534, 544 (1987), the question of whether there exists a "*genuine* issue of material fact" with respect to the reasonableness of a party's reliance is a "question[ ] of law," *Ellis v. Williams*, 319 N.C. 413, 415 (1987) (emphasis added). Thus, we have on numerous prior occasions recognized that the question of whether a party's reliance has been "established as a matter of law" to be reasonable can be resolved on a party's appeal from a summary judgment order when the underlying material facts are undisputed. *Cummings v. Carroll*, 866 S.E.2d 675, 2021-NCSC-147, ¶ 38; *see also Ussery v. Branch Banking & Tr. Co.*, 368 N.C. 325, 336 (2015) (concluding on review of summary judgment order that debtor "cannot . . . claim he reasonably relied on" creditor's representation, and citing Court of Appeals decision for proposition that a party's reliance can be "unreasonable as a matter of law").

2006-174, § 1, 2005 N.C. Sess. Laws (Reg. Sess. 2006) at 630 (emphasis added). An actuarial study commissioned by the General Assembly to analyze the fiscal impact of changing the service requirement stated that "current non-contributory premiums paid on behalf of current retirees . . . *will continue to be a State obligation for some time until these retirees exit the Plan*." Staff of N.C. Gen. Assembly Fiscal Rsch. Div., *Legislative Actuarial Note on S. 837 (2d ed.): State Health Plan / 20-Year Vesting*, 2005 Sess. (Reg. Sess. 2006) (June 30, 2006) at 3 (emphasis added). The fiscal note further explained that the bill increasing the minimum number of years of service "*requires its application to be prospective*" and reiterated that the State would still have an "obligation" to pay the premiums of retirees and current employees who had already vested. *Id.* (emphasis added). This legislative history, including the General Assembly's frequent use of the terms "vested" and "obligation" in reference to its future payment of retirees' health insurance premiums, is further support for the proposition that the Retirees have demonstrated that they and the State shared a common understanding of what this benefit represented.

¶ 53 Indeed, on numerous occasions, State officials and agents involved in administering retirement benefits told State employees they could rely on the promise of health insurance coverage in retirement. In press releases, benefits booklets, and training materials, the State conveyed to its employees that after completing the applicable service eligibility requirements they would be entitled to health insurance coverage "for life." Customer service personnel were instructed that "[i]n order for the retiree to have paid health insurance, he [or she] must have 5 years of contributing membership in the State System, and be in receipt of a monthly retirement benefit with the State. . . . With growing concern about health insurance in our society today, this is an important piece of information that the member should know if he [or she] is vested . . . ." Again, the State does not dispute the existence of these materials or the words they contained. As this evidence makes clear, the State believed it had undertaken an ongoing commitment to provide health insurance benefits to retired employees who had satisfied eligibility requirements and, frequently and in numerous ways, communicated that fact to its employees; it is not unreasonable for these employees to have taken the State at its word.

¶ 54 For years, employees entering into public employment "relie[d] on" the State's promise of future health insurance benefits. *Bailey*, 348 N.C. at 144. Prior cases recognizing that this kind of reliance gives rise to vested rights are, like this case, "rooted in the protection of

expectational interests upon which individuals have relied through their actions." *Id.* at 145. "The statutory system that was in the background of the contract between" the Retirees and the State "set out the mechanism through which the [employees] could obtain" the health insurance benefit. *NCAE*, 368 N.C. at 789. Once state employees met the applicable statutory eligibility requirements and became eligible to enroll in a noncontributory health insurance plan, their right vested to enroll in a plan offering equivalent or greater value to the one offered to them at the time the contract was formed. Accordingly, we overrule the Court of Appeals' determination that the Retirees had failed to prove the existence of a vested right subject to protection by the Contracts Clause.

C. Whether the contract was substantially impaired.

¶ 55 The trial court's sole legal conclusion addressing the second prong of the *U.S. Trust* test was its determination that "[t]he [State] substantially impaired the contracts with the [Retirees]." The Court of Appeals did not reach this prong because it held that the Retirees possessed no vested right to health insurance benefits upon retirement which the State could unconstitutionally impair. Regardless, in reviewing the trial court's order resolving the parties' competing motions for summary judgment, we review de novo the trial court's findings of fact and conclusions of law addressing this issue. *Forbis*, 361 N.C. at 523–24.

¶ 56 At the outset, we reject the State's argument that the existence of the right-to-amend provision in the Establishing Act automatically negates the Retirees' argument that the 2011 Act substantially impaired their vested rights. This argument suggests that because the General Assembly reserved the right to make (and regularly has made) changes to the terms of the health insurance plans available to retirees, any such changes are necessarily consistent with the Retirees' "objectively reasonable reliance interests." The absurdity of this argument is apparent if taken to its logical conclusion. Under the State's reasoning, the General Assembly would not substantially impair the Retirees' vested rights as long as the legislature continued offering a premium-free 80/20 PPO Plan, even if the State imposed a $1 million copay for covered services or a similarly exorbitant deductible. Yet obviously, under these circumstances the Retirees would rightly perceive that they were being denied the benefit of their bargain. Their vested right is more than just the right to enroll in a health insurance plan: this right has a substantive component relating to the value of the plans being offered by the State.

¶ 57 Nonetheless, recognizing that the Retirees' vested rights have a substantive component does not resolve whether those rights were substantially impaired. To answer that question, the Retirees needed to

(1) demonstrate a method for objectively determining the value of a health insurance plan, one that accounted for the numerous variables influencing the "value" of a health insurance plan to a plan member; (2) establish the baseline value of the health insurance plan offered to each Retiree when his or her right to retirement health insurance benefits vested; and (3) show that the plans currently offered by the State are substantially less valuable than those baseline plans. We agree with the State that the trial court erred in resolving these issues on summary judgment.

¶ 58 The trial court entered three findings of fact of particular relevance to its conclusion that the 2011 Act substantially impaired the Retirees' vested rights:

> 27. The currently offered 80/20 "Enhanced" Plan (formerly called the standard plan) [i.e., the 80/20 PPO Plan] was the continuation of the primary "regular state health plan" [i.e., the Major Medical Plan] that had been offered premium-free from 1982 until August 31, 2011.
>
> . . . .
>
> 29. The most appropriate way to measure the value of a health plan received by a member of that plan and to compare the value between offered plans is through the calculation and use of a plan's actuarial value. Through the use of actuarial values, it can be determined whether a given plan is equivalent to another plan or not – the effective actuarial equivalency (hereinafter such calculation methodology referred to as "Equivalent").
>
> . . . .
>
> 31. The health plan(s) offered by the State Health Plan at the 70/30 level and referred to by the State Health Plan as the "Basic" and "Traditional" Plans from 2011-2016 is of a lesser value than the 80/20 Standard Plan and was not and is not Equivalent to the 80/20 Standard Plan.

Contrary to the trial court's characterization of these findings as "[u]ndisputed," each was and remains vigorously contested. The State disagrees that the 80/20 PPO Plan is the continuation of the Major Medical Plan, disputes the validity of the "actuarial equivalency" method for determining the relative value of different health insurance plans,

and asserts that "the State has always offered plaintiffs a health plan with an actuarial value" "that mirrors the Major Medical Plan." There is evidence in the record to support both parties' positions on each of these determinative issues.

¶ 59 The "facts alleged" by the State "are of such nature as to affect the result of the action," and "question[s] as to . . . the weight of evidence" have been brought forth by the parties. *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 535 (1971). For example, the State argued at summary judgment that the evidence showed that "over 75% of retirees who are enrolled in the State Health Plan are eligible for Medicare" and that for those individuals, the cost difference between the 70/30 and 80/20 PPO Plans is just "slightly over $3 per month." Thus, the State contends that even after 2011 the Retirees could remain in a premium-free health insurance plan providing essentially the same or greater value as the plan offered to them when their rights vested. The State also presented evidence disputing the Retirees' assertion that a sizeable portion of the class was paying premiums as high as $100 per month to maintain their coverage.

¶ 60 At the same time, the Retirees have offered evidence that supports the conclusion that their rights were substantially impaired, including that the plans currently offered cost members, on average, an additional $400 per year, and that the total impairment to the Retirees' contractual rights may exceed $100 million in back premiums. Thus, there are "genuine issues [of] . . . material fact" with respect to the second prong of the *U.S. Trust* test, and these issues are "triable." *N.C Nat'l Bank v. Gillespie*, 291 N.C. 303, 310 (1976). Although some of the material evidence is undisputed, the parties do not agree on the central questions of how to value health insurance plans and whether the health insurance plans offered to retirees after the effective date of the 2011 Act are comparable to or of substantially lesser value than the plans they bargained for. Accordingly, "summary judgment was improperly granted." *N.C. Farm Bureau Mut. Ins. Co. v. Sadler*, 365 N.C. 178, 182 (2011).

¶ 61 Moreover, we note that even if the trial court's findings had been undisputed, the findings would be inadequate to support the conclusion that there was a substantial impairment. The trial court largely based its conclusion that the State substantially impaired class members' contracts on its finding that "[t]he health plan[s] offered by the State Health Plan at the 70/30 level . . . is of a lesser value than the 80/20 Standard Plan and was not and is not Equivalent to the 80/20 Standard Plan." But, in addition to finding that the value of a vested right has been diminished, the trial court also needed to determine the magnitude of the decline in

value in order to ascertain whether any impairment was "substantial." As we explained in *Bailey*, "[w]hen examining whether a contract has been unconstitutionally impaired, the 'inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. . . . Minimal alteration of contractual obligations may end the inquiry at [this] stage.' " *Bailey*, 348 N.C. at 151 (alterations in original) (quoting *Allied Structural Steel Co.*, 438 U.S. at 244–45 (footnote omitted)).[9] Given the complexities inherent in determining the comparative value of different health insurance plans, it was not self-evident that eliminating the premium-free 80/20 PPO Plan while maintaining the premium-free 70/30 PPO Plan worked a substantial impairment.

¶ 62 Further, the parties agreed to defer consideration of the extent of damages, but that evidence may be relevant to whether the contractual impairment was substantial. Different class members vested at different times, and the terms of the Major Medical Plan and the PPO plans the State began offering later have changed over time. These evolutions matter in the Contracts Clause analysis—the terms of the plan offered when each class member vested establish the baseline value of what each individual bargained for. Yet the trial court's findings do not address these nuances, and the evidence at summary judgment indicates that the value of the benefits the Retirees could expect at the time they vested remains hotly contested. It may be that the Retirees can obviate the need to engage with these complexities by proving that all of the noncontributory plans offered to class members who vested before 2011 were more valuable than any of the noncontributory plans offered to class members today—or, vice versa, that the State can prevail by proving that the value of a noncontributory plan offered to every class member today is equivalent to or more generous than the most valuable noncontributory plan available to all class members when they vested. But neither side has met its burden of doing so on summary judgment. This information is actually disputed and is crucial to measuring whether there was an impairment and, if so, whether the impairment was substantial.

¶ 63 The trial court's determination that there was a substantial impairment of the Retirees' contracts was based on an overly simplified characterization of what the Retirees were entitled to when they vested and what they were receiving after the 2011 Act took effect. The trial

9. In assessing whether an impairment is minimal or substantial, courts may consider the "overall impact" of the impairment when measured in the aggregate provided they do so in the context of the size of the class. *Bailey v. State*, 348 N.C. 130 (1998). For example, the $100 million impairment at issue in *Bailey* would likely not have established the existence of a "substantial" impairment if the class had been comprised of one hundred million people.

court's order masks important disputes of material fact that must be resolved before a decision on liability can be made. In *Simpson* this Court held that the plaintiffs "had a contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights became vested." 88 N.C. App. at 224. In *Faulkenbury*, we explained further that the plaintiffs "expected to receive what they were promised at the time of vesting. They may not have known the exact amount, but this was their expectation. The contract was substantially impaired when the promised amount was taken from them." 345 N.C. at 692–93. Therefore, the crucial factual matters relevant to this issue are the value of the plan in which the Retirees were vested and the value of what was offered to them after the 2011 Act took effect. While it is understandable that the parties and the trial court were not eager to wrestle with the factually complex assessment of which class members suffered what damages, in this case that assessment of damages may be crucial to determining whether, in fact, the impairment of the state employees' contract was substantial and thus constitutionally salient.

D. Whether the impairment was reasonable and necessary.

¶ 64 If the trial court determines that the 2011 Act substantially impaired the Retirees' contractual rights, the final question is whether the impairment was "a reasonable and necessary means of serving a legitimate public purpose." *NCAE*, 368 N.C. at 791. "This portion of the inquiry involves a two-step process, first identifying the actual harm the state seeks to cure, then considering whether the remedial measure adopted by the state is both a reasonable and necessary means of addressing that purpose." *Id.* (citing *Energy Rsrvs. Grp. v. Kan. Power & Light Co.*, 459 U.S. 400, 412 (1983)). At this stage of the analysis, "[t]he burden is upon the State . . . to justify an otherwise unconstitutional impairment of contract." *Id.* (citing *U.S. Trust*, 431 U.S. at 31).

¶ 65 In its order granting the Retirees' partial motion for summary judgment, the trial court found that the State's impairment "was neither reasonable nor necessary to serve an important public purpose." However, underlying this determination are genuine disputes about material facts which require further development at trial. In particular, should it need to reach this question on remand, the trial court must closely examine the State's asserted interest in avoiding an "estimated thirty-five billion dollars in unfunded future outlays" and the Retirees' rejoinder that "there were a multitude of methods to stabilize the State Health Plan without impairing vested rights."

¶ 66 Although answering this question primarily requires resolving disputed issues of fact, certain applicable legal principles can be discerned

from our case law. First, the existence of the problem the State asserts it seeks to address by impairing a contract cannot be assumed. Instead, the State must present "evidence [which] indicates that such a problem existed." *Id.* Second, the State's interest in not expending resources is not, standing alone, sufficient to render an impairment reasonable. Many contracts commit a party to expending resources in the future, even if the party would prefer not to when the time comes to pay; the party's obligation to do so anyway makes it a contract. The fact that disallowing an impairment might require the General Assembly to make difficult choices regarding how to allocate resources to best manage its fiscal obligations does not necessarily justify abrogating the legislature's contractual obligations. *Bailey*, 348 N.C. at 152. Similarly, the fact that certain trends have caused an increase in the State's cost of maintaining the promised benefits does not, on its own, justify an impairment. *See Faulkenbury*, 345 N.C. at 694 ("We do not believe that because the pension plan has developed in some ways that were not anticipated when the contract was made, the state or local government is justified in abrogating it."). Finally, the State "is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." *U.S. Trust*, 431 U.S. at 31. The existence of "alternative[ ]" methods of advancing the State's asserted interest other than imposing an impairment tends to detract from the State's contention that the impairment is necessary. *NCAE*, 368 N.C. at 792. At the same time, we recognize that "the [e]conomic interest of the state may justify . . . interference with contracts," *Home Bldg. & Loan Ass'n*, 290 U.S. at 437, and that the State always retains the authority to act to protect the public should it be faced with a grievous fiscal emergency. On remand, these principles should guide the trial court's effort to ascertain whether any impairment of the Retirees' rights, if proved, was "reasonable and necessary" and thus permissible under the Contracts Clause.

IV. The State Law of the Land Clause Claim

¶ 67 In addition to their Contracts Clause claim, the Retirees also alleged that the 2011 Act constituted an impermissible taking of private property in violation of article I, section 19 of the North Carolina Constitution. The trial court agreed, concluding that "[i]mposing premiums on the 80/20 Standard Plan . . . constituted a 'taking' under state law of Class Members' private property by restricting and/or eliminating Class Members' contractual right to the non-contributory 80/20 Standard plan and reducing a vested retirement benefit." The Court of Appeals reversed based on its conclusion that the Retirees had failed to demonstrate the existence of any rights implicated by the 2011 Act. *Lake*, 264 N.C. App. at 188.

¶ 68 The Law of the Land Clause of the North Carolina Constitution guarantees in relevant part that "[n]o person shall be . . . in any manner deprived of his . . . property, but by the law of the land." N.C. Const. art. I, § 19. As the Court of Appeals correctly explained, "[a] contractual right is a property right, and the impairment of a valid contract is an impermissible taking of property." *Lake*, 264 N.C. App. at 188; *see also Bailey*, 348 N.C. at 154 ("[V]alid contracts are property . . . ." (quoting *Lynch v. United States*, 292 U.S. 571, 579 (1934))). Thus, in holding that the Retirees do have a vested right in retirement health insurance coverage, we necessarily overrule the Court of Appeals' conclusion that the Retirees lack a colorable state constitutional claim. Of course, even if there is a property right, there can be no constitutionally impermissible taking if there is no taking. *Cf. Dep't of Transp. v. Adams Outdoor Advert. of Charlotte Ltd. P'ship*, 370 N.C. 101, 106 (2017) ("When the State *takes* private property . . . the owner must be justly compensated.") (cleaned up) (emphasis added). Accordingly, on remand, the trial court must reassess the Retirees' Law of the Land Clause claim in light of its resolution of the parties' dispute regarding the value of the noncontributory plans offered by the State to Retirees at various times.

V. Conclusion

¶ 69 This case raises significant questions relating to the State's efforts over the years to attract and retain talented employees while responsibly managing its fiscal obligations. This dispute also raises issues of profound importance to the hundreds of thousands of dedicated public employees who devoted their lives to serving their fellow North Carolinians, often for less immediate remuneration than would have been available to them in the private sector. Although our decision in this case does not end this controversy, it narrows the issues and, hopefully, moves the parties closer to a just resolution.

¶ 70 Today we hold that the Retirees who satisfied the eligibility requirements existing at the time they were hired obtained a vested right in remaining eligible to enroll in a noncontributory health insurance plan for life. These Retirees reasonably relied on the promise of this benefit in choosing to accept employment with the State. They are entitled to the benefit of their bargain, which includes eligibility to enroll in a premium-free plan offering the same or greater coverage value as the one available to them when their rights vested. Nevertheless, we also hold that the trial court erred in concluding that the Retirees brought forth undisputed facts demonstrating that their vested rights were substantially impaired when the General Assembly eliminated the premium-free 80/20 PPO Plan in 2011. In particular, the trial court overlooked genuine

issues of material fact regarding the proper way to assess the relative value of different health insurance plans and potential differences in the value of the bargain struck by class members whose rights vested at different times. The trial court also erred in entering summary judgment against the State on the issue of whether any such impairment was reasonable and necessary.

¶ 71 Accordingly, we overrule the portion of the Court of Appeals decision holding that the Retirees lacked any right which triggered the protections of the Contracts Clause of the United States Constitution and the Law of the Land Clause of the North Carolina Constitution. We affirm the decision of the Court Appeals to the extent it reversed the trial court's grant of partial summary judgment in the Retirees' favor, reverse that court's decision with respect to its conclusion that the State was entitled to summary judgment on liability, and remand this action to the trial court for proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Chief Justice NEWBY did not participate in the consideration or decision of this case.

Justice BARRINGER concurring in part and dissenting in part.

¶ 72 I agree with the majority that we must remand this case for factual determinations on whether the State substantially impaired a contract and whether such impairment was reasonable and necessary. However, because the evidence in the record, when viewed in the light most favorable to the State, creates a genuine issue of material fact as to whether any contractual obligation is present, we should also remand that issue to the trial court for resolution by the fact-finder. Accordingly, I respectfully concur in part and dissent in part.

Analysis

¶ 73 In determining whether the State has unconstitutionally impaired a contract, North Carolina courts follow a three-part test involving "(1) whether a contractual obligation is present, (2) whether the state's actions impaired that contract, and (3) whether the impairment was reasonable and necessary to serve an important public purpose." *Bailey v. State*, 348 N.C. 130, 141 (1998). The trial court granted summary judgment in plaintiffs' favor on all three of these inquiries. The Court of Appeals reversed the trial court's grant of summary judgment, ruling in the State's favor on the first inquiry that no contractual obligation

was present. *Lake v. State Health Plan for Tchrs. & State Emps.*, 264 N.C. App. 174, 188 (2019). Based on the evidence the parties have put forward, I cannot conclude that either court properly resolved, at the summary judgment stage, the issue of whether a contractual obligation was present.

A. Standard of Review

¶ 74 When there is a motion for summary judgment pursuant to Rule 56, the court may consider evidence consisting of admissions in the pleadings, depositions, answers to interrogatories, affidavits, admissions on file, oral testimony, and documentary materials. . . . The motion shall be allowed and judgment entered when such evidence reveals no genuine issue as to any material fact, and when the moving party is entitled to a judgment as a matter of law.

> An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action. The issue is denominated "genuine" if it may be maintained by substantial evidence.
>
> Summary judgment provides a drastic remedy and should be cautiously used so that no one will be deprived of a trial on a genuine, disputed issue of fact. The moving party has the burden of clearly establishing the lack of triable issue, and his papers are carefully scrutinized and those of the opposing party are indulgently regarded.

Koontz v. City of Winston-Salem, 280 N.C. 513, 518 (1972); *see also* N.C. R. Civ. P. 56(c).

¶ 75 "This Court reviews appeals from summary judgment de novo." *Ussery v. Branch Banking & Tr. Co.*, 368 N.C. 325, 334–35 (2015). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651 (2001). "[I]f a review of the record leads the appellate court to conclude that the trial judge was resolving material issues of fact rather than deciding whether they existed, the entry of summary judgment is held erroneous." *Alford v. Shaw*, 327 N.C. 526, 539 (1990).

B. Whether a contractual obligation is present

¶ 76 I agree with the majority that the statute does not expressly indicate an intent to create a contractual obligation. Yet, under our past precedent, plaintiffs can still establish that a contractual obligation is present if plaintiffs demonstrate that they reasonably relied upon the promise of retirement benefits provided by statute in entering into or continuing employment with the State. *Bailey*, 348 N.C. at 145. However, plaintiffs' reliance must have been reasonable, and reasonableness is a question of fact. *Id.* at 146; *see also Olivetti Corp. v. Ames Bus. Sys., Inc.*, 319 N.C. 534, 544 (1987) ("Ordinarily, the question of whether an actor is reasonable in relying on the representations of another is a matter for the finder of fact.").

¶ 77 As evidence of the reasonableness of their reliance, plaintiffs primarily point to booklets distributed by the North Carolina Retirement System. However, multiple booklets contained explicit disclaimers, in boldface type, on the first page that stated:

> DISCLAIMER: The availability and amount of all benefits you might be eligible to receive is governed by Retirement System law. The information provided in this handbook cannot alter, modify or otherwise change the controlling Retirement System law or other governing legal documents in any way, *nor can any right accrue to you by reason of any information provided or omission of information provided herein.* In the event of a conflict between this information and Retirement System law, Retirement System law governs.

(Emphasis added.) Recent booklets, like the one dated 2009, described themselves as "summariz[ing] the benefits available to [employees] as a member of the retirement system, including: [b]enefits [employees] will receive at retirement once [they] meet the service and age requirements . . . .]" The 2009 booklet further explained that a public employee in North Carolina was part of a "defined benefit plan," meaning that when a public employee retired the employee's "life long benefits [we] re guaranteed and protected by the Constitution of the State of North Carolina." The booklets also indicated that after satisfying certain criteria an employee became "vested in the Retirement System," making that employee "eligible to apply to lifetime monthly retirement benefits." This emphatic language, however, was referring to Retirement System benefits in general, as opposed to the State Health Plan.

¶ 78 When discussing the State Health Plan for retirees, the booklets used different language. The booklets stated only that employees "*may* also be eligible for retiree health coverage as described on page 20." (Emphasis added.) On page 20, the booklets stated:

> When you retire, you are eligible to enroll in the State Health Plan, with the costs determined by when you began employment and which health coverage you select, if you contributed to the Teachers' and State Employees' Retirement System for at least five years . . . while employed as a teacher or State employee.
>
> At the time you complete your retirement application, be sure to complete an application to enroll in the retiree group of the State Health Plan.
>
> Under current law, if you were first hired prior to October 1, 2006, and retire with five or more years of State System membership service, the State will pay either all or most of the cost, depending on the plan chosen, for your individual coverage under one of the Preferred Provider Organization (PPO) plans. . . .

(Emphasis omitted.) Accordingly, the description of benefits was expressly recognized as conditional and further conditioned as representing the state of health benefits as they existed "[u]nder current law." In addition, the booklets described pensions as "continu[ing] for the rest of [one's] life" and "vested" but did not use the same language to describe health benefits.

¶ 79 Similarly, in older booklets, the language used to describe retirement benefits was not the same as the language used to describe retiree health insurance. The 1988 retirement booklet did not mention the State Health Plan until the very last section, labeled "Remember," which also discussed programs like Social Security and Medicare. Specifically, the booklet stated, "When you retire, if you have at least 5 years of service as a contributing teacher or State employee, you are eligible for coverage under the State's Comprehensive Major Medical Plan with the State contributing toward the cost of your coverage." (Emphasis omitted.)

¶ 80 Furthermore, the booklets distributed by the State Health Plan to employees explicitly stated on the first or second page that "[t]he North Carolina General Assembly determines benefits for the State Health Plan and has the authority to change benefits." The 1983 booklet warned that "[s]ince the Plan was established by law, benefits and policies can

be changed only through new legislation." The 1986 booklet cautioned that "the level of benefits and claims service have varied from time to time" and that "[g]iven the continued rise in health care costs and utilization (some 12% to 14% a year in this plan alone!) further benefit changes may be necessary." The 2004 booklet included a boldface type section which stated that the "Benefits for the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan are based upon legislation enacted by the North Carolina General Assembly." Finally, the booklets repeatedly noted that "[i]f any information in [the booklets] conflict[ed] with . . . the General Statutes . . . the General Statutes . . . w[ould] prevail."

¶ 81 As for the General Statutes, one section contains language noting that the State "undertakes to make available a State Health Plan . . . for the benefit of . . . eligible retired employees," but that statement is modified in the same sentence with a clause explaining that the plan "will pay benefits in accordance with the terms of this Article." N.C.G.S. § 135-48.2(a) (2021). The very next section of the statute contains an explicit disclaimer that the terms of the article are subject to alteration and termination, stating, "The General Assembly reserves the right to alter, amend, or repeal this Article." N.C.G.S. § 135-48.3 (2021).

¶ 82 While under our precedent the presence of a right-to-amend provision does not necessarily prevent a contractual obligation from arising from a statute, *see Simpson v. N.C. Loc. Gov't Emps.' Ret. Sys.*, 88 N.C. App. 218, 221, 223–24 (1987), *aff'd per curiam*, 323 N.C. 362 (1988), a right-to-amend provision is relevant to the plaintiffs' reasonable reliance. As the Supreme Court of the United States has observed, reserving the "rights to repeal, alter, or amend, [an a]ct at any time" is "hardly the language of a contract." *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 467 (1985) (cleaned up).

¶ 83 Further, not only did the General Assembly explicitly reserve the right to alter, amend, or repeal the State Health Plan, the undisputed evidence in the record reveals that the General Assembly frequently exercised this amendment power. Since the inception of the State Health Plan, the State has regularly amended it, raising coinsurance amounts from 5% to 10% to 20%, increasing the deductible from $100 to $150 to $250 to $350 to $450, and enlarging the out-of-pocket maximum from $100 to $300 to $1,000 to $1,500 to $2,000. In the twenty-nine years between 1982 and 2011, the record reflects that the General Assembly passed at least twenty-nine bills amending the State Health Plan, making almost two hundred individual changes.

¶ 84 In short, when plaintiffs' evidence is "carefully scrutinized" and the State's evidence is "indulgently regarded," *Koontz*, 280 N.C. at 518, and when all inferences are drawn in the light most favorable to the State, *Dalton*, 353 N.C. at 651, there is a genuine issue of material fact as to plaintiffs' reasonable reliance. The record does not evidence "multiple unequivocal written statements in official publications and employee handbooks" promising plaintiffs lifetime noncontributory health insurance in exchange for their public service as state employees. *Bailey*, 348 N.C. at 138, 146. While certainly some materials supporting plaintiffs' position exist, plaintiffs must also admit the existence of other materials that directly contradict the reasonableness of their reliance. When the entirety of the record is viewed in the light most favorable to the State, the right-to-amend provision, the disclaimers in the booklets, and the constant statutory changes are substantial evidence that could support a finding that plaintiffs did not reasonably rely on a promise of health benefits provided by statute in entering into or continuing employment with the State.

¶ 85 Additionally, as part of the determination of whether a contractual obligation exists, the fact-finder must also determine what the terms of a contractual obligation produced by plaintiffs reasonable reliance would be. On appeal, the plaintiffs asked this Court to reinstate the term of the contractual obligation found by the trial court; namely, a contract for "the 80/20 'Enhanced' Plan (as offered by the State Health Plan in September 2011), or its Equivalent, premium-free to all non-Medicare-eligible Class Members for the duration of their retirements." The majority, however, now recognizes a different contractual obligation, one that requires the State to provide a health plan of "equivalent or greater value to the one offered" at the time each individual plaintiff "met the applicable statutory eligibility requirements and became eligible to enroll in a noncontributory health insurance plan." Yet for the entirety of the State Health Plan's thirty-year existence, retirees have never received a health plan at a locked-in, unchanging value. Rather, retirees received whatever plan the State was then offering to current employees, which varied from year to year. Given this constant variance, the question of what terms would attach to a contractual obligation arising out of plaintiffs' reasonable reliance is also a genuine issue of material fact, one that the fact-finder should resolve in this case.

Conclusion

¶ 86 In adherence to this Court's admonition that summary judgment should be "used cautiously . . . so that no one will be deprived of a trial on a genuine, disputed issue of fact," *Koontz*, 280 N.C. at 518, I have

no choice but to conclude that this case should be remanded to the fact-finder. Based on the evidence in the record, the question of whether a contractual obligation could have arisen through plaintiffs' reasonable reliance and what terms would apply to such a contractual obligation is a genuine issue of material fact. Accordingly, I would remand that issue to the trial court for further proceedings not inconsistent with this opinion. Otherwise, I concur in the majority's opinion.

Justice BERGER joins in this concurring in part and dissenting in part opinion.

M.E.
v.
T.J.

No. 18A21

Filed 11 March 2022

1. Civil Procedure—voluntary dismissal—amended by hand—functional Rule 60(b) motion—domestic violence protective order action

Where plaintiff dismissed her Chapter 50B domestic violence protective order action but, thirty-nine minutes later, struck through the notice and wrote "I do not want to dismiss this action" on the Notice of Voluntary Dismissal form, the trial court acted within its broad discretion in exercising jurisdiction over the Chapter 50B complaint. Plaintiff's amended notice of dismissal functionally served as a motion for equitable relief under Civil Procedure Rule 60(b), and her later amendment to the complaint, which defendant consented to, functionally served as a refiling.

2. Appeal and Error—preservation of issues—constitutional argument—raised and ruled upon

Plaintiff properly preserved her argument regarding the constitutionality of Chapter 50B where plaintiff's counsel raised the issue before the trial court—by asserting that the statute was unconstitutional based on a recent opinion of the United States Supreme Court, stating that there was no rational basis for the statutory provision at issue, and citing an out-of-state case in support of plaintiff's argument—and obtained a ruling from the trial court.

3. Appeal and Error—preservation of issues—mandatory joinder—raised for first time on appeal—challenge to N.C. law

Defendant did not properly preserve her mandatory joinder argument—that the opinion of the Court of Appeals declaring a portion of Chapter 50B unconstitutional must be vacated and remanded for the mandatory joinder of the General Assembly pursuant to Civil Procedure Rule 19(d)—where the mandatory joinder issue was first raised by the Court of Appeals' dissenting opinion. Even assuming that Rule 19(d) mandatory joinder may be raised for the first time on appeal, plaintiff's Chapter 50B action for obtaining a domestic violence protective order—in which plaintiff asserted an as-applied constitutional defense to prevent dismissal of her action—did not qualify as a civil action challenging the validity of a North Carolina statute.

Justice BERGER dissenting.

Chief Justice NEWBY and Justice BARRINGER join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 275 N.C. App. 528 (2020), reversing the ruling entered 7 June 2018 by Judge Anna Worley in the District Court of Wake County, and remanding for further proceedings. Heard in the Supreme Court on 5 January 2022.

Scharff Law Firm, PLLC, by Amily McCool; ACLU of North Carolina Legal Foundation, by Irena Como and Kristi L. Graunke; and Patterson Harkavy LLP, by Christopher A. Brook, for plaintiff-appellee.

Nelson Mullins Riley & Scarborough LLP, by Lorin J. Lapidus, D. Martin Warf, and G. Gray Wilson, for defendant-appellant.

Joshua H. Stein, Attorney General, by Ryan Y. Park, Solicitor General, for State of North Carolina and Governor Roy Cooper, amici curiae.

Brooks, Pierce, McLendon, Humphrey, & Leonard, LLP, by Sarah M. Saint and Eric M. David; and Kathleen Lockwood and Nisha Williams, for North Carolina Coalition Against Domestic Violence, amicus curiae.

M.E. v. T.J.

[380 N.C. 539, 2022-NCSC-23]

Poyner Spruill LLP, by Andrew H. Erteschik, John Michael Durnovich, N. Cosmo Zinkow; and Robinson, Bradshaw, & Hinton, P.A., by Stephen D. Feldman, Mark A. Hiller, and Garrett A. Steadman, for Legal Aid of North Carolina, The North Carolina Justice Center, and The Pauli Murry LGBTQ+ Bar Association, amici curiae.

Womble Bond Dickinson (US) LLP, by Kevin A. Hall, Samuel B. Hartzell, and Ripley Rand, for Former District Court Judges, amicus curiae.

HUDSON, Justice.

¶ 1 For well over a century, North Carolina courts have abided by the foundational principle that administering equity and justice prohibits the elevation of form over substance. *See, e.g.*, *Currie v. Clark*, 90 N.C. 355, 361 (1884) ("This would be to subordinate substance to form and subserve no useful purpose."); *Moring v. Privott*, 146 N.C. 558, 567 (1908) ("Equity disregards mere form and looks at the substance of things."); *Fidelity & Casualty Co. v. Green*, 200 N.C. 535, 538 (1931) ("To hold otherwise, we apprehend, would be to exalt the form over the substance."). In alignment with this principle, our Rules of Civil Procedure are intended to *facilitate* access to justice, not obstruct it. *See Pyco Supply Co. v. American Centennial Ins. Co.*, 321 N.C. 435, 443 (1988) (noting that "deny[ing] plaintiff its day in court simply for its imprecision with the pen . . . would be contrary to the purpose and intent of . . . the modern rules of civil procedure."). Indeed, "it is the essence of the Rules of Civil Procedure that decisions be had on the merits and not avoided on the basis of mere technicalities." *Mangum v. Surles*, 281 N.C. 91, 99 (1972).

¶ 2 This principle holds particular salience in the realm of Domestic Violence Protective Orders (DVPO). Survivors of domestic violence who turn to courts for protection typically do so shortly after enduring physical or psychological trauma, and without the assistance of legal counsel. Maria Amelia Calaf, *Breaking the Cycle: Title VII, Domestic Violence, and Workplace Discrimination*, 21 Law & Ineq. 167, 170 (2003) (noting that "the effects [of domestic violence] extend beyond the physical harms, causing substance abuse, severe psychological trauma, and stress-related illnesses."); Julia Kim & Leslie Starsoneck, *North Carolina District Courts' Response to Domestic Violence* 57 (Dec. 2007), https://www.nccourts.gov/assets/inline-files/dv_studyreport.pdf

[hereinafter Kim & Starsoneck] (noting that "generally most 50B plaintiffs and defendants appear pro se."). Accordingly, "[t]he procedures under N.C.[G.S.] § 50B-2 are intended to provide a method for trial court judges or magistrates to quickly provide protection from the risk of acts of domestic violence by means of a process which is readily accessible to *pro se* complainants." *Hensey v. Hennessy*, 201 N.C. App. 56, 63 (2009).

¶ 3 Today, we apply these longstanding principles here, where plaintiff struck through and wrote "I do not want to dismiss this action" on a Notice of Voluntary Dismissal form that she had filed thirty-nine minutes previously, after learning that she could, in fact, proceed with her original Chapter 50B DVPO complaint. Defendant contends, *inter alia*, that this handwritten amendment could not revive plaintiff's previously dismissed complaint, and therefore that the trial court erred in exercising jurisdiction over the subsequent hearing. Holding so, however, "would be to exalt the form over the substance." *Fidelity & Casualty Co.*, 200 N.C. at 538.

¶ 4 Accordingly, we hold that the district court did not err in determining that it had subject matter jurisdiction to allow plaintiff to proceed with her Chapter 50B DVPO action. Further, we hold that plaintiff's constitutional argument was properly preserved for appellate review, and that defendant's Rule 19(d) necessary joinder argument was not properly preserved for appellate review. Finally, we note that the merits of the Court of Appeals' ruling that N.C.G.S. § 50-B(1)(b)(6)'s exclusion of complainants in same-sex dating relationships from DVPO protection is unconstitutional were not at issue before this Court, and therefore stand undisturbed and maintain normal precedential effect. We therefore modify and affirm the ruling of the Court of Appeals below reversing the trial court's denial of plaintiff's Chapter 50B complaint.

I. Factual and Procedural Background

A. Chapter 50B Filings and District Court Rulings

¶ 5 Plaintiff M.E. and defendant T.J., both women, were in a dating relationship that ended badly. After plaintiff ended the relationship on 29 May 2018, she alleged that defendant became verbally and physically threatening toward plaintiff, including attempting to force her way into plaintiff's house and needing to be removed by police. On the morning of 31 May 2018, plaintiff, accompanied by her mother, went to the Wake County Clerk of Superior Court office seeking the protections of a Domestic Violence Protective Order and an ex parte temporary DVPO pursuant to N.C.G.S. Chapter 50B. After plaintiff explained her situation to staff members at the clerk's office, they provided her

with the appropriate forms to file a Chapter 50B "Complaint and Motion for Domestic Violence Protective Order" (AOC-CV-303), which include a section to request a temporary "Ex Parte Domestic Violence Order of Protection." *See* N.C.G.S. § 50B-2(d) (2021) (establishing that "[t]he clerk of superior court of each county shall provide pro se complainants all forms that are necessary or appropriate to enable them to proceed pro se pursuant to this section.").

¶ 6 Plaintiff then filled out the Chapter 50B forms she had been given. Plaintiff checked Box 4 of the form, which alleges that "[t]he defendant has attempted to cause or has intentionally caused me bodily injury; or has placed me or a member of my family or household in fear of imminent serious bodily injury or in fear of continued harassment that rises to such a level as to inflict sustained emotional distress . . ." In the subsequent space for further details, plaintiff wrote:

> May 29th 2016[.] Became aggressive after stating the relationship was over. Had to push her back twice and lock her out of my home then placed 911 call. Officer arrived and she appeared to have left. She was hiding in back yard. Attempted to force entry into the home. 911 was called again. Defendant has not stopped attempting to contact me.

Plaintiff also checked Box 6, indicating that "I believe there is danger of serious and imminent injury to me or my child(ren)." Finally, plaintiff checked Box 9, indicating that "[t]he defendant has firearms and ammunition as described below." Below, plaintiff wrote "access to father[']s gun collection[.]"

¶ 7 Plaintiff requested "emergency relief" by way of "an Ex Parte Order before notice of a hearing is given to the defendant." Plaintiff further requested that the court order Defendant: "not to assault, threaten, abuse, follow, harass, or interfere with me[;]" "not to come on or about . . . my residence [or] . . . the place where I work[;]" "[to] have no contact with me[;]" "[not] possess[ ] or purchas[e] a firearm[;]" and take "anger management classes." After filing this paperwork, plaintiff was instructed by the staff members to return to court later that day for her hearing.

¶ 8 When plaintiff returned to court for her hearing, the trial court "informed [her] that because both she and [d]efendant were women, and only in a 'dating' . . . relationship, N.C.G.S. § 50B-1(b)(6) did not allow the trial court to grant her an ex parte DVPO or any other protections afforded by Chapter 50B." *M.E.*, 275 N.C. App. at 533. Indeed, N.C.G.S. § 50B-1(a) limits DVPO protection to those who are in or have been in

a "personal relationship," and N.C.G.S. § 50B-1(b) subsequently defines "personal relationship" as "a relationship wherein the parties involved:"

> (1) Are current or former spouses;
>
> (2) Are persons *of opposite sex* who live together or have lived together;
>
> (3) Are related as parents and children . . . ;
>
> (4) Have a child in common;
>
> (5) Are current or former household members; [or]
>
> (6) Are persons *of the opposite sex* who are in a dating relationship or have been in a dating relationship.

(emphasis added). As such, the statute excludes from DVPO eligibility any person, like plaintiff, who is or was in a same-sex dating relationship. Instead of seeking a DVPO under Chapter 50B, trial court informed plaintiff

> that she could seek a civil ex parte temporary no-contact order and a permanent civil no-contact order, pursuant to Chapter 50C. *See* N.C.G.S. § 50C-2 (2017). Chapter 50C expressly states that its protections are for "persons against whom an act of unlawful conduct has been committed by another person *not involved in a personal relationship* with the person *as defined in G.S. 50B-1(b)*." N.C.G.S. § 50C-1(8) (2017) (emphasis added).

M.E., 275 N.C. App. at 533. Notably, however, unlike DVPOs under Chapter 50B, no-contact orders under Chapter 50C do not allow the trial court to place any limits upon the defendant's right to possess a weapon.

¶ 9 Accordingly, plaintiff returned to the clerk's office and explained to staff members what the judge had told her. Staff members then gave plaintiff a new stack of forms to complete, including the Chapter 50C forms and a notice of voluntary dismissal of her previous Chapter 50B complaint. Plaintiff filled out the forms and gave them back to the staff members, who filed them. Plaintiff's notice of voluntary dismissal was filed-stamped 3:12 p.m.

¶ 10 Shortly thereafter, after a conversation among the staff, staff members informed plaintiff that she could still request a DVPO under Chapter 50B even if the trial court was going to deny it. Staff members then gave the original file-stamped notice of voluntary dismissal back to plaintiff. Plaintiff struck through the notice and wrote on it: "I strike through this

voluntary dismissal. I do not want to dismiss this action[.]" Plaintiff then returned the form to the staff, who wrote "Amended" at the top and re-filed it. The amended form was file-stamped a second time at 3:51 p.m., thirty-nine minutes after the original filing.

¶ 11 Plaintiff's four actions (Chapter 50B ex parte DVPO, Chapter 50B permanent DVPO, Chapter 50C ex parte Temporary No-Contact Order for Stalking, and Chapter 50C permanent Temporary No-Contact Order for Stalking) were then heard at the afternoon session of district court that same day, 31 May 2018. Plaintiff was present without counsel at this hearing; defendant was not present. The court had before it the full record of the case, including plaintiff's amended voluntary dismissal form. The court "denied [p]laintiff's request for a Chapter 50B *ex parte* DVPO, but set a hearing date of 7 June 2018 for a hearing on [p]laintiff's request for a permanent DVPO." *M.E.*, 275 N.C. App. at 533. Specifically, the trial court concluded in its order that: "allegations are significant but parties are in same[-]sex relationship and have never lived together, [and] therefore do not have relationship required in statute." The trial court did, however, grant plaintiff's ex parte request pursuant to Chapter 50C by entering a "Temporary No-Contact Order for Stalking or Nonconsensual Sexual Conduct" that same day. *See* N.C.G.S. § 50C-6(a) (2021).

> In the *ex parte* 50C Order, the trial court found as fact that "plaintiff has suffered unlawful conduct by defendant in that:" "On 5/29/18, defendant got physically aggressive and was screaming in plaintiff's face; defendant then left after LEO (law enforcement officers) were called; after LEO left," defendant "attempted to re-enter plaintiff's house; LEO returned to remove defendant from plaintiff's house; since that date, defendant has repeatedly called plaintiff, texted plaintiff from multiple numbers, and contacted plaintiff's friends and family." The trial court found that defendant "continues to harass plaintiff," and that "defendant committed acts of unlawful conduct against plaintiff." The trial court concluded that the "only reason plaintiff is not receiving a 50B DVPO today" is because plaintiff and defendant had been "in a same[-]sex relationship and do not live together," and that N.C.G.S. § 50B-1(b), as plainly written, requires the dating relationship to have consisted of people of the "opposite sex."

M.E., 275 N.C. App. at 534 (cleaned up).

¶ 12 On 7 June 2018, the trial court conducted its subsequent hearing on plaintiff's Chapter 50B and Chapter 50C permanent motions. Plaintiff appeared with counsel at this hearing; defendant appeared pro se. Here again, the trial court enjoyed the benefit of the full case record, including plaintiff's amended voluntary dismissal form. First, regarding the Chapter 50B complaint, "[d]efendant consented to an amendment to the order to indicate her relationship with [p]laintiff was one 'of same sex currently or formerly in dating relationship.' " *Id.* at 535. The trial court then stated: "I do not have a complaint . . . that would survive a Rule 12 motion [to dismiss]" because the plain language of N.C.G.S. § 50B-1(b)(6) does not include same-sex dating relationships within its definition of covered "personal relationships." The trial court and plaintiff's counsel then engaged in the following exchange:

> [Plaintiff's counsel]: Your honor, with that amended, I understand what you already said, that you don't believe it would survive a motion to dismiss. However, . . . we do feel at this point that [plaintiff] should be allowed to proceed with the Domestic Violence Protective Order, that it's—the statute, that 50B, is unconstitutional as it's written post the same-sex marriage equality case from the Supreme Court in *Obergefell* and that there's no rational basis at this point to have a statute that limits dating relationships to folks of opposite sex. So we would ask that Your Honor consider allowing [plaintiff] to proceed with her Domestic Violence Protective Order case.
>
> [The court]: Do you have any precedent?
>
> [Plaintiff's counsel]: Not in North Carolina.
>
> [The court]: Other than the *Obergefell* case.
>
> [Plaintiff's counsel]: No, Your Honor, not in North Carolina.
>
> [The court]: In anywhere else that has a similar statute?
>
> [Plaintiff's counsel]: Your Honor[,] . . . South Carolina recently just overturned their statute that was written similarly.
>
> [The court]: In what procedure?
>
> [Plaintiff's counsel]: In a Domestic Violence Protective Order procedure.

> [The court]: By what court?
>
> [Plaintiff's counsel]: Either their court of appeals or their supreme court. Not by a district court, Your Honor. Yes, I believe it was a court of appeals case.
>
> [The court]: And in checking the legislative history, when was the last time our legislature addressed this?
>
> [Plaintiff's counsel]: Your Honor, our legislature has amended 50B for different reasons, but they have not amended the personal relationship categories any time in the recent past that I can recall. And, your honor, we've explained to [plaintiff], certainly, the bind that the [c]ourt is in in being bound by the language of the statute.
>
> [The court]: Without a more expansive argument on constitutionality, I won't do it. I think there is room for that argument. I think that with some more presentation that maybe we could get there, but I don't think on the simple motion that I'm ready to do that.
>
> [Plaintiff's counsel]: Thank you, Your Honor. Then with the [c]ourt's denial of the plaintiff's 50B action, then we would like to proceed with the 50C.
>
> [The court]: Okay.

¶ 13 In its subsequent form order, the trial court ruled that:

> plaintiff has failed to state a claim upon which relief can be granted pursuant to the statute, due to the lack of [a] statutorily defined personal relationship. . . . [H]ad the parties been of opposite genders, those facts would have supported the entry of a Domestic Violence Protective Order (50B).
>
> N.C.G.S. [§] 50B was last amended by the legislature in 2017 without amending the definition of "personal relationship" to include persons of the same sex who are in or have been in a dating relationship. This recent amendment in 2017 was made subsequent to the United States Supreme Court decision in *Obergefell v. Hodges*, 576 U.S. [664,] (2015), and yet the legislature did not amend the definition of personal relationship to include dating partners of the same sex.

Accordingly, the trial court dismissed plaintiff's Chapter 50B DVPO motion.

¶ 14 Later, the trial court issued a subsequent written order regarding plaintiff's Chapter 50B DVPO motion. There, the trial court concluded the following:

> 2. The [p]laintiff, through her counsel, argued that she should be allowed to proceed on her request for a [DVPO] because the current North Carolina General Statute 50B-1(b) is unconstitutional after the United States Supreme Court decision in *Obergefell v. Hodges* and that there is no rational basis for denying protection to victims in same-sex dating relationships who are not spouses, ex-spouses, or current or former household members.
>
> 3. North Carolina General Statute 50B was passed by the North Carolina General Assembly in 1979 and later amended on several occasions. It states that an aggrieved party with whom they have a personal relationship may sue for a [DVPO] in order to prevent further acts of domestic violence. The question for the [c]ourt is how a personal relationship is defined. North Carolina General Statute 50B-1 states: "for purposes of this section, the term 'personal relationship' means wherein the parties involved: (1) are current or former spouses; (2) are persons of opposite sex who live together or have lived together; (3) are related as parents and children, including others acting in loco parentis to a minor child, or as grandparents and grandchildren. For purposes of this subdivision, an aggrieved party may not obtain an order of protection against a child or grandchild under the age of 16; (4) have a child in common; (5) are current or former household members; (6) are persons of the opposite sex who are in a dating relationship or have been in a dating relationship."
>
> . . . .
>
> 4. This definition prohibits victims of domestic violence in same sex dating relationships that are not spouses, ex-spouses, or current of former household

members from seeking relief against a batterer under Chapter 50B.

5. The [c]ourt must consider whether it has jurisdiction to create a cause of action that does not exist and to enter an order under this statute when the statute specifically excludes it. The difficult answer to this question is no, it does not. The General Assembly has the sole authority to pass legislation that allows for the existence of any domestic violence protective order. The legislature has not extended this cause of action to several other important family relationships including siblings, aunts, uncles, "step" relatives, or in-laws.

6. In this context, the [c]ourts only have subject matter jurisdiction and the authority to act and enjoin a defendant when the legislature allows it. On numerous occasions the Court of Appeals has stricken orders entered by the District Court that do no[t] include proper findings of fact or conclusions of law that are necessary to meet the statute. [ ] Defendant must be on notice that a cause of action exists under this section when the act of domestic violence is committed. The [c]ourt cannot enter a [DVPO] against a [d]efendant when there is no statutory basis to do so. In the case before the [c]ourt, the [d]efendant had no such notice.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED as follows:

1. The [p]laintiff has failed to prove grounds for issuance of a [DVPO] as [p]laintiff does not have a required "personal relationship" with the [d]efendant as required by North Carolina General Statute [Chapter] 50B.

¶ 15 The trial court did, however, grant plaintiff's Chapter 50C motion for a No-Contact Order for Stalking or Nonconsensual Sexual Conduct, ordering defendant not to "visit, assault, molest, or otherwise interfere with the plaintiff" for one year from the date issued, 7 June 2018.

¶ 16 On 29 June 2018, plaintiff appealed the trial court's denial of her DVPO motion to the North Carolina Court of Appeals. In response,

defendant sent a letter to plaintiff's counsel and the trial court that: denied that she and plaintiff were in a dating relationship; requested that the Court of Appeals not hear the case; asserted that "the LGBT community is asking for special treatment[ ] in this proceeding" and that "[t]hey should not be given equal access to protection under law as heterosexual relationships[;]" and emphasized that she did not want to be involved in the appeal.

B. Court of Appeals

¶ 17 Before the Court of Appeals, plaintiff argued "that the trial court's denial of her request for a DVPO violated [her] constitutional rights protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment [of the United States Constitution], as well as the associated provisions of the North Carolina Constitution." *M.E.*, 275 N.C. App. at 538.

¶ 18 The Court of Appeals also allowed several parties to file *amicus curiae* briefs in favor of the plaintiff. These amici included the Attorney General of North Carolina, who submitted a brief on behalf of the State seeking "to vindicate the State's powerful interests in safeguarding all members of the public from domestic violence." *Id.*

¶ 19 Defendant did not file an appellate brief, and no *amici* sought to file briefs contesting plaintiff's arguments on appeal.

> There were also no motions filed by any entity of the State to submit an *amicus* brief, or otherwise intervene in th[e] action, for the purpose of arguing in favor of the constitutionality of the Act. Therefore, [the Court of Appeals], on its own motion and by order entered 3 May 2019, appointed an *amicus curiae* ("*Amicus*"), to brief an argument in response to [p]laintiff's arguments on appeal.

Id.

¶ 20 On 31 December 2020, the Court of Appeals filed an opinion in which it agreed with plaintiff's claims under both the North Carolina and United States constitutions. Accordingly, the Court of Appeals reversed the trial court's denial of Plaintiff's complaint for a Chapter 50B DVPO and remanded for entry of an appropriate order. *Id.* at 590. Further, the court explicitly stated that its holding applied with equal force "to all those similarly situated with Plaintiff who are seeking a DVPO pursuant to Chapter 50B; that is, the 'same-sex' or 'opposite sex' nature of their

"dating relationship" shall not be a factor in the decision to grant or deny a petitioner's DVPO claim under the Act." *Id.*

¶ 21 Judge Tyson dissented. *Id.* Specifically, the dissent would have held that plaintiff's appeal was not properly before the court because of five purported jurisdictional and procedural defects: (1) plaintiff's filing of a voluntary dismissal of her 50B complaint; (2) plaintiff's failure to subsequently file a post-dismissal Rule 60 motion; (3) plaintiff's failure to argue and preserve any constitutional issue for appellate review; (4) plaintiff's failure to join necessary parties; and (5) plaintiff's failure to comply with Rule 3 to invoke appellate review. *Id.* (Tyson, J., dissenting). Additionally, the dissent asserted that the majority's dismissal of the arguments of the appointed *amicus curiae* regarding the trial court's jurisdiction was erroneous.

¶ 22 First, the dissent asserted that plaintiff's filing of her voluntary dismissal of her previous 50B complaint extinguished the trial court's jurisdiction over that action. *Id.* at 591–92 (Tyson, J., dissenting). The dissent would have held that plaintiff's informal nullification of the voluntary dismissal did not properly revive her claim—she instead should have re-invoked the district court's jurisdiction with a new complaint. *Id.* at 592 (Tyson, J., dissenting).

¶ 23 Second, and as an alternative to filing a new complaint, the dissent asserted that plaintiff should have filed a Rule 60(b) motion to seek to revive the dismissed complaint. *Id.* (Tyson, J., dissenting). Without a refiling or a 60(b) motion, the dissent contended, plaintiff's complaint was extinguished by her voluntary dismissal. *Id.* at 593 (Tyson, J., dissenting).

¶ 24 Third, the dissent asserted that plaintiff did not properly preserve her constitutional argument for appellate review. *Id.* at 593–94 (Tyson, J., dissenting). The dissent would have instead held that plaintiff counsel's reference to *Obergefell* did not adequately raise a constitutional question, and, in any event, the trial court did not rule on the act's constitutionality, so that plaintiff may not now argue on appeal that the Act is unconstitutional. *Id.* at 594 (Tyson, J., dissenting).

¶ 25 Fourth, the dissent would have held that, because this is a civil action challenging the validity of a North Carolina statute, the Speaker of the House of Representatives and the President Pro Tempore of the Senate must be joined as defendants under Rule 19(d) of the North Carolina Rules of Civil Procedure. *Id.* at 595 (Tyson, J., dissenting). Separate from and in addition to the trial court's lack of subject matter jurisdiction, then, the dissent asserted that no further action or review is proper until this statutory defect is cured. *Id.* (Tyson, J., dissenting).

¶ 26 Fifth, the dissent noted that plaintiff's trial counsel's hard copy of the notice of appeal was filed with the clerk of superior court and bore no manuscript signature. *Id.* at 596 (Tyson, J., dissenting). Accordingly, the dissent asserted, the notice of appeal is defective under N.C. R. App. P. 3(d), which requires that a notice of appeal be signed by the counsel of record. *Id.* (Tyson, J., dissenting).

¶ 27 Finally, the dissent took issue with the majority's failure to review and dismissal of the arguments regarding subject matter jurisdiction raised by the appointed *amicus curiae*. *Id.* at 597 (Tyson, J., dissenting). The dissent asserted that amicus' supplemental filing and motion to dismiss for lack of jurisdiction were vital and should have been included in the record on appeal. *Id.* at 597–99 (Tyson, J., dissenting).

¶ 28 In sum, the dissent would have held that no appeal was actually pending before the court due to the trial court's lack of jurisdiction, among other procedural defects. *Id.* at 599–600 (Tyson, J., dissenting).

C. Present Appeal

¶ 29 On 11 January 2021, defendant, now represented by the former court-appointed *amicus* counsel, filed a notice of appeal in this Court based on the Court of Appeals dissent.

¶ 30 First, defendant asserts that the trial court and the Court of Appeals lacked proper jurisdiction due to plaintiff's voluntary dismissal of the Chapter 50B complaint and plaintiff's failure to include the dismissal in the record on appeal, on the basis that plaintiff's Chapter 50B DVPO complaint was completely extinguished upon the filing of the notice of voluntary dismissal at 3:12 p.m. on 31 May 2018. Accordingly, defendant asserts, because plaintiff never formally filed a new Chapter 50B complaint and no request for Rule 60(b) relief was sought or granted by the trial court, "the action was rendered moot and the [trial] court was divested of subject matter jurisdiction to proceed with the merits disposition." Defendant further contends that because the trial court lacked subject matter jurisdiction on the Chapter 50B action, its subsequent order on the action was void *ab initio*.

¶ 31 Correspondingly, defendant asserts that when plaintiff did not include the notice of voluntary dismissal form in her record on appeal, she "failed to meet her burden of establishing jurisdiction of the [trial] court and Court of Appeals by omitting a court paper essential to the determination of whether such jurisdiction existed." Independent of this omission, though, defendant contends that the Court of Appeals had a duty to evaluate its own appellate jurisdiction over plaintiff's purported appeal before proceeding to a disposition on the merits. Defendant argues that

"by deciding an appeal with a blind eye towards" a missing jurisdictional document, the [Court of Appeals] majority failed to carry out its duty to properly examine [its own] jurisdiction."

¶ 32 Second, defendant asserts that plaintiff failed to specifically preserve the constitutional issue for review by the Court of Appeals pursuant to Rule 10(a) of the North Carolina Rules of Appellate Procedure, or to obtain a ruling from the trial court on the issue upon the party's request, objection, or motion." Here, defendant contends, plaintiff's "vague constitutional reference" did not properly specify the grounds of her objection, and the trial court "confined its ruling to non[-]constitutional grounds." Accordingly, defendant asserts, the Court of Appeals erred in considering plaintiff's constitutional argument.

¶ 33 Third, defendant contends that the Court of Appeals ruling must be vacated and remanded for the mandatory joinder of the North Carolina General Assembly under Rule 19(d) of the North Carolina Rules of Civil Procedure. Defendant notes that Rule 19(d) requires that

> [t]he Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly, must be joined as defendants in any civil action challenging the validity of a North Carolina Statute or provision of the North Carolina Constitution under State or federal law.

Echoing the reasoning first raised in the Court of Appeals dissent, defendant contends that "[b]ecause plaintiff has challenged the constitutionality of N.C.G.S. § 50B-1(b)(6), the President *Pro Tempore* of the Senate and the Speaker of the House of Representatives are necessary parties and '*must be joined as defendants' in the civil action*." "Consequently," defendant argues, "no disposition on appeal or before the [trial] court can occur until mandatory joinder is completed as provided by statute."

¶ 34 In response, plaintiff first argues that the trial court had proper jurisdiction to hear her DVPO complaint and motions where, at the suggestion of court staff, she quickly withdrew a notice of voluntary dismissal filed mistakenly or inadvertently because she wished to continue prosecuting her case. Plaintiff claims that defendant waived her objection regarding the notice of voluntary dismissal when she failed to raise it in the trial court or the Court of Appeals. In any event, plaintiff contends, the trial court had authority and discretion to construe plaintiff's filings in her favor and permit amendment as needed to promote justice where plaintiff was proceeding pro se in a domestic violence action. To prevent

injustice and inefficiency, plaintiff asserts, "trial courts have discretion to take steps to protect litigants poised to relinquish their cases, particularly where those litigants are vulnerable."

¶ 35 Further, plaintiff asserts, the trial court had inherent authority to grant plaintiff relief under Rule 60(b) in the interest of justice. Although plaintiff's amended notice of dismissal was not styled as a formal 60(b) motion, plaintiff contends that it was "nonetheless sufficient for the trial court to award her equitable relief from the unintended dismissal under" that rule because it met the substantive requirements of that rule, namely that it was filed inadvertently or mistakenly, and was quickly fixed.

¶ 36 Second, plaintiff addresses defendant's preservation argument. As an initial matter, plaintiff again argues that by failing to raise objections to constitutional preservation below, defendant waived those objections. Indeed, plaintiff notes, in Defendant's lone submission during the appellate process (the letter to the trial court after its ruling), defendant herself briefly engaged in the constitutional merits without objecting to preservation. But even if defendant has not waived her preservation challenge, plaintiff argues, the constitutional issue was properly preserved. Specifically, plaintiff contends that the record makes clear that the trial court had notice of the constitutional issue before it and ruled on it, which is sufficient to preserve it for appeal. Plaintiff agues that her counsel expressly preserved the constitutional issue by mentioning *Obergefell* by name, arguing that the statute was unconstitutional because there was no rational basis supporting the exclusion of same-sex couples, and noting a recent South Carolina Supreme Court case raising the same constitutional issues. Further, plaintiff asserts, the trial court ruled on the constitutional issue where it expressly engaged with the issue both on the record during oral argument and in its final written order before denying the DVPO motion.

¶ 37 Third and finally, plaintiff addresses defendant's joinder challenge, arguing first that Defendant waived her joinder defense where she failed to raise it in either the trial court or the Court of Appeals. Even if defendant has not waived her objection to joinder, though, plaintiff argues that joining legislative leaders is not required here because actions under Chapter 50B are not "civil actions challenging the validity of a North Carolina statute" under Rule 19(d). Rather, plaintiff asserts that her Chapter 50B complaint was brought for the sole purpose of obtaining a DVPO, and the as-applied constitutional question was raised merely in defense of the trial court's statutory jurisdiction to hear the claim of a person in a same-sex dating relationship.

¶ 38 Finally, this Court allowed several *amici* to file briefs, including: (1) North Carolina Solicitor General Ryan Park, on behalf of the State; (2) the North Carolina Coalition Against Domestic Violence; (3) Legal Aid of North Carolina, the North Carolina Justice Center, and the Pauli Murray LGBTQ+ Bar Association; and (4) ten former North Carolina District Court judges. All *amicus* briefs filed supported the ruling of the Court of Appeals and plaintiff's positions on appeal.

II. Analysis

¶ 39 We now consider each of defendant's claims before this Court. As conclusions of law, each of the issues raised by defendant "are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 168 (2011).

¶ 40 First, we conclude that the trial court acted within its broad discretion in exercising jurisdiction over plaintiff's Chapter 50B complaint because plaintiff's amended notice of dismissal functionally served as a motion for equitable relief under Rule 60(b), and plaintiff's amendment to the complaint—which defendant consented to—functionally served as a refiling. Second, we hold that plaintiff properly preserved the constitutional issue for appellate review. Third, we conclude that defendant did not properly preserve her joinder argument because it was first raised by the Court of Appeals dissent without being argued before that court. Accordingly, we modify and affirm the ruling of the Court of Appeals below reversing the trial court's denial of plaintiff's Chapter 50B complaint.

A. Jurisdiction

¶ 41 **[1]** First, defendant asserts that the trial court and the Court of Appeals lacked jurisdiction due to plaintiff's voluntary dismissal of the Chapter 50B complaint and plaintiff's failure to include the dismissal in the record on appeal. We disagree.

¶ 42 Generally, trial court judges enjoy broad discretion in the efficient administration of justice and in the application of procedural rules toward that goal. *See Miller v. Greenwood*, 218 N.C. 146, 150 (1940) ("It is within [a judge's] discretion to take any action [toward ensuring a fair and impartial trial] within the law and so long as he [or she] does not impinge upon [statutory] restrictions.") Indeed,

> [i]t is impractical and would be almost impossible to have legislation or rules governing all questions that may arise on the trial of a case. Unexpected developments, especially in the field of procedure, frequently

> occur. When there is no statutory provision or well recognized rule applicable, the presiding judge is empowered to exercise his [or her] discretion in the interest of efficiency, practicality, and justice.

Shute v. Fisher, 270 N.C. 247, 253 (1967).

¶ 43 Accordingly, rather than erecting hurdles to the administration of justice, "[t]he Rules of Civil Procedure [reflect] a policy to resolve controversies on the merits rather than on technicalities of pleadings." *Quackenbush v. Groat*, 271 N.C. App. 249, 253 (2020) (cleaned up).

> A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If [procedural filings use] such terms that every intelligent person understands [what] is meant, it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else.

Harris v. Maready, 311 N.C. 536, 544 (1984) (cleaned up).

¶ 44 These general principles are particularly important within the context of DVPOs. In fact, the remedies of N.C.G.S. Chapter 50B are specifically written with ease of access for pro se complainants in mind. For instance, N.C.G.S. § 50B-2(a) notes that "[a]ny aggrieved party entitled to relief under this Chapter may file a civil action and proceed pro se, without the assistance of legal counsel." Further, subsection (d) of that statute is dedicated entirely to establishing procedures for "Pro se Forms[:]"

> The clerk of superior court of each county shall provide to pro se complainants all forms that are necessary or appropriate to enable them to proceed pro se pursuant to this section. The clerk shall, whenever feasible, provide a private area for complainants to fill out forms and make inquiries. The clerk shall provide a supply of pro se forms to authorized magistrates who shall make the forms available to complainants seeking relief under . . . this section.

N.C.G.S. § 50B-2(d).

¶ 45 This statutory emphasis recognizes and accounts for the factual reality of domestic violence adjudication: survivors of domestic violence who turn to courts for protection typically do so shortly after enduring

physical or psychological trauma, and without the assistance of legal counsel. Calaf, 21 Law & Ineq. at 170; Kim & Starsoneck at 57. As such, "[t]he procedures under N.C.[G.S.] § 50B-2 are intended to provide a method for trial court judges or magistrates to quickly provide protection from the risk of acts of domestic violence by means of a process which is readily accessible to *pro se* complainants." *Hensey*, 201 N.C. App. at 63.

¶ 46 Rule 60 of the North Carolina Rules of Civil Procedure provides trial courts with a procedure through which they can provide equitable relief from various judgments, orders, or proceedings. N.C.G.S. § 1A-1, R. 60. Specifically, Rule 60(b) establishes that "[o]n motion and upon such terms as are just, the court may relieve a party or [her] legal representative from a final judgment, order, or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect." *Id.*

¶ 47 Here, the trial court acted well within its broad discretion, and with the benefit of the full record before it, when exercised jurisdiction over plaintiff's Chapter 50B DVPO complaint. Specifically, plaintiff's amended notice of voluntary dismissal—in which she struck through and handwrote "I do not want to dismiss this action" on the form she had inadvertently or mistakenly filed thirty-nine minutes previously—served as functional Rule 60(b) motion through which the trial court could, and did, grant equitable relief. There is plainly no doubt as to plaintiff's intentions as expressed through the amended form: she "d[id] not want to dismiss th[e] action." Likewise, when the trial court allowed plaintiff to amend her Chapter 50B complaint—without objection from defendant—at the 7 June hearing on the merits, it reasonably could have considered this amendment as, in essence, a refiling after a voluntary dismissal.[1] While it may have been preferable for plaintiff to have filed an official 60(b) motion or a new Chapter 50B complaint for formality's sake, her amendment nevertheless expressed her intention to proceed with the complaint "in such terms that every intelligent person understands [what] is meant, [and therefore] has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else." *Harris*, 311 N.C. at 544. Indeed, "[t]o hold otherwise . . . would be to exalt the form over the substance." *Fidelity & Casualty Co.*, 200 N.C. at 538.

¶ 48 Plaintiff here is exactly the type of complainant that the *pro se* provisions of Chapter 50B contemplate: one who is navigating the complex

1. In light of defendant's consent to this amendment, there can be no doubt that she had ample notice that plaintiff was pursuing a DVPO under Chapter 50B.

arena of legal procedure for the first time, without the assistance of legal counsel, soon after experiencing significant trauma. At every turn on 31 May 2018, plaintiff diligently followed the direction of court staff: in filing her initial Chapter 50B forms that morning, in completing the stack of new forms including the notice of voluntary dismissal at 3:12 p.m., and in amending and refiling that form thirty-nine minutes later to express her intention to proceed with her complaint. When the trial court exercised jurisdiction over plaintiff's Chapter 50B complaint, it did so with the benefit of the full record before it, including the court file (the trial court noted it was entering an order denying the DVPO "after hearing from the parties and reviewing the file") which held the amended notice of voluntary dismissal. It was squarely within the discretion of the trial court to understand the plain intent of plaintiff's amended notice of voluntary dismissal as a Rule 60(b) motion for equitable relief or her amended Chapter 50B complaint as a functional refiling, and to subsequently exercise its jurisdiction. To be clear, this is not to say that plaintiff, acting without legal counsel in the harried setting of the clerk's office, intended for her amendment to the voluntary dismissal form to serve as a formal 60(b) motion, or that she or her counsel intended for the Chapter 50B complaint amendment at the 7 June hearing to serve as a formal refiling. They likely did not. Rather, we hold that it was within the trial court's broad discretion—with the benefit of the full record before it—to *treat* these two amendments as a functional 60(b) motion or refiling in light of the plaintiff's plain intention to move forward with her Chapter 50B complaint.[2] While we cannot know precisely from the record whether the trial court considered these procedures when it determined that it had jurisdiction, its decision to exercise jurisdiction itself evidences that the court understood plaintiff's plain intention to proceed. It is not the job of this Court to second-guess the trial court's determination of its own jurisdiction when that determination was supported by competent evidence and practical common sense. Accordingly, the trial court did not err in exercising jurisdiction, and the Court of Appeals did not err in its subsequent review.

B. Preservation

¶ 49 **[2]** Second, defendant asserts that plaintiff failed to preserve the constitutional issue for appeal. Again, we disagree.

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2. While the dissent warns that this understanding of the trial court's discretion "will disrupt the orderly flow of cases through our trial courts[,]" the facts here prove the opposite: it ensures that common sense and the smooth functioning of vital remedial procedures, like those protecting survivors of domestic violence, will not be thwarted by overly technical scrutiny of that discretion.

¶ 50 Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure establishes that

> [i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion. Any such issue that was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted . . . may be made the basis of an issue presented on appeal.

Put differently, Rule 10(a)(1) creates two distinct requirements for issues preservation: (1) a timely objection clearly (by specific language or by context) raising the issue; and (2) a ruling on that issue by the trial court. These requirements are grounded in judicial efficiency; they "prevent[ ] unnecessary retrials by calling possible error to the attention of the trial court so that the presiding judge may take corrective action if it is required." *State v. Bursell*, 372 N.C. 196, 199 (2019). "Practically speaking, Rule 10(a)(1) contextualizes the objection for review on appeal, thereby enabling the appellate court to identify and thoroughly consider the specific legal question raised by the objecting party." *Id.*

¶ 51 Notably, Rule 10(a)(1) does not require a party to recite certain magic words in order to preserve an issue; rather, it creates a functional requirement of bringing the trial court's attention to the issue such that the court may rule on it. *See State v. Garcia*, 358 N.C. 382, 410 (2004) (noting that because an issue was not raised at trial, "the trial court was denied the opportunity to consider, and, if necessary, to correct the error.") For instance, in *State v. Murphy*, this Court determined that "[a]lthough the issue of defendant's invocation of his right to remain silent was not clearly and directly presented to the trial court, . . . the defendant's theory was implicitly presented to the trial court and thus [was properly preserved for appellate review]." 342 N.C. 813, 822 (1996). Contrastingly, in cases where this Court has determined that an issue was *not* properly preserved, the records tend to include no reference to the issue at trial. *See, e.g.*, *Bursell*, 372 N.C. at 200 (noting "the absence of any reference to the Fourth Amendment, *Grady*[,] or other relevant SBM case law, privacy, or reasonableness"); *Garcia*, 358 N.C. at 410 (noting that "defendant did not raise this constitutional issue at trial."); *State v. McKenzie*,

292 N.C. 170, 176 (1997) (noting that because "[n]o argument was made in the trial court on that issue . . . the trial court was wholly unaware" of the issue.).

¶ 52 Regarding the second requirement of Rule 10(a)(1), this Court has observed that appellate courts "will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the court below." *State v. Jones*, 242 N.C. 563, 564 (1955). For instance, in *State v. Dorsett*, this Court declined to consider a constitutional issue after the trial court "expressly declined to rule on th[e] question." 272 N.C. 227, 229 (1967).

¶ 53 Here, plaintiff properly raised and received a ruling on her claim that it would be unconstitutional to deny relief under N.C.G.S. Chapter 50B because she was in a same-sex dating relationship. Thus, the question of whether DVPO protection could be denied to those in same-sex dating relationships was properly preserved for appeal. First, there can be no doubt that plaintiff's counsel properly raised the issue during the hearing. Specifically, plaintiff's counsel asserted that "[Chapter] 50B[ ] is unconstitutional as it's written post the same-sex marriage equality case in *Obergefell* and . . . there's no rational basis at this point to have a statute that limits dating relationships to folks of opposite sex." In this statement, plaintiff's counsel expressly: (1) asserted that the judge's application of the statute in question was unconstitutional; (2) cited by name the landmark United States Supreme Court ruling on the unconstitutionality of same-sex marriage prohibitions under the Fourteenth Amendment, *see Obergefell v. Hodges*, 576 U.S. 644 (2015); and (3) recited a specific legal standard associated with judicial analysis under that amendment. Contrary to the claim of the dissenting opinion below that plaintiff's counsel's statement was merely a "cryptic reference to *Obergefell*[,]" we understand it to clearly and explicitly challenge the constitutionality of the application of the statute in question under well-established Due Process and Equal Protection doctrines.

¶ 54 Next, when asked by the trial court if any other jurisdictions have struck down similar DVPO restrictions, plaintiff's counsel noted a recent case in which the South Carolina Supreme Court, citing *Obergefell*, ruled that the sections of their state's DVPO statute that excluded people in same-sex relationships from protection were unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution. *Doe v. State*, 421 S.C. 490, 495–96, 507 n.12 (2017).

¶ 55 Finally, the trial court's subsequent written order explicitly acknowledged that plaintiff had raised this constitutional issue, noting that

> [p]laintiff, through her counsel, argued that she should be allowed to proceed on her request for a [DVPO] because the current [N.C.G.S. §] 50B-1(b) is unconstitutional after the United States Supreme Court decision in *Obergefell v. Hodges* and that there is no rational basis for denying protection to victims in same-sex dating relationships . . . .

Accordingly, plaintiff clearly raised her constitutional argument at trial, thus satisfying the first requirement for issue preservation under Rule 10(a)(1).

¶ 56 Second, the record makes clear that the trial court sufficiently ruled on the constitutional issue, thus satisfying the second requirement for issue preservation under Rule 10(a)(1). Specifically, the trial court "passed upon" this issue in three distinct places: (1) during the hearing; (2) in its subsequent form order; and (3) in its subsequent written order.

¶ 57 First, the trial court ruled upon plaintiff's constitutional argument during the hearing. In response to plaintiff's counsel's request "that Your Honor consider allowing [plaintiff] to proceed with her [DVPO] case" in light of the constitutional argument, the trial court stated: "Without a more expansive argument on constitutionality, I won't do it. I think there is room for that argument. I think that with some more presentation that maybe we could get there, but I don't think on the simple motion I'm ready to do that." Plainly, this exchange constitutes the trial court making a determination, or "passing upon," plaintiff's argument.

¶ 58 Second, the trial court ruled upon plaintiff's constitutional argument within its subsequent form order denying plaintiff's DVPO motion. Specifically, after noting that "had the parties been of opposite genders, th[e]se facts would have supported the entry of a [DVPO,]" the trial court observed that the General Assembly's 2017 amendment to Chapter 50B "was made subsequent to the United Statutes Supreme Court decision in *Obergefell v. Hodges*, 567 U.S. [644,] (2015), and yet the legislature did not amend the definition of personal relationship to include dating partners of the same sex." Again, this statement indicates the trial court's rejection of, and thus ruling upon, plaintiff's constitutional argument in light of legislative intent.

¶ 59 Third, the trial court ruled upon plaintiff's constitutional argument within its subsequent written order. Specifically, after summarizing plaintiff's constitutional argument and noting Chapter 50B's legislative history and exclusion of same-sex dating relationships from DVPO protection, the trial court stated:

> 5. The [c]ourt must consider whether it has jurisdiction to create a cause of action that does not exist and to enter an order under this statute when the statute specifically excludes it. The difficult answer to this question is no, it does not. The General Assembly has the sole authority to pass legislation that allows for the existence of any [DVPO]. The legislature has not extended this cause of action to several other important family relationships including siblings, aunts, uncles, "step" relatives, or in-laws.
>
> 6. In this context, the [c]ourts only have subject matter jurisdiction and the authority to act and enjoin a defendant when the legislature allows it. . . .

As above, this statement indicates the trial court's rejection of plaintiff's constitutional argument on the grounds of legislative intent.

¶ 60 Finally, it is also worth noting that in her only submission in this case from the trial court's initial ruling to her notice of appeal to this Court, defendant directly engaged in the constitutional issue raised by plaintiff at trial. Specifically, defendant asserted "that the LGBT community is asking for special treatment[ ] in this proceeding . . . [and] should not be given equal access to protection under law as heterosexual relationships." This direct engagement by defendant in the constitutional issue further indicates that the issue was properly preserved for appellate review.

¶ 61 Accordingly, plaintiff's argument regarding the constitutionality of Chapter 50B as applied to DVPO complainants in same-sex dating relationships was properly preserved for appellate review. We therefore hold that the Court of Appeals did not err in determining the same.

C. Joinder

¶ 62 **[3]** Third, defendant contends that the Court of Appeals ruling must be vacated and remanded for the mandatory joinder of the North Carolina General Assembly under Rule 19(d) of the North Carolina Rules of Civil Procedure. Because this argument was not raised by defendant below and was first raised by the Court of Appeals dissent, though, it is not properly before this Court, and we therefore decline to consider it. In any event, even assuming *arguendo* that mandatory joinder under Rule 19(d) need not be raised below in order to be considered here, joining the legislative leaders is not required here.

¶ 63 "This Court has long held that issues and theories of a case not raised below will not be considered on appeal . . . ." *Westminster Homes*,

Inc. v. Town of Cary Zoning Bd. of Adjustment, 354 N.C. 298, 309 (2001); *see, e.g.*, *Smith v. Bonney*, 215 N.C. 183, 184–85 (1939) (noting that "[t]o sustain the assignments of error would be to allow the appellant to try the case in the Superior Court upon one theory and to have the Supreme Court to hear it upon a different theory."). Indeed, when "[a]n examination of the record discloses that the cause was not tried upon that theory [below], . . . the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court." *Weil v. Herring*, 207 N.C. 6, 10 (1934).

¶ 64 Rule 19(d) of the North Carolina Rules of Civil Procedure establishes that "[t]he Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly, must be joined as defendants in any civil action challenging the validity of a North Carolina statute or provision of the North Carolina Constitution under State or federal law." This Rule, however, must be read in harmony with its preceding Rules. Specifically, Rule 12(h)(2) establishes that "a defense of failure to join a necessary party . . . may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits." Further, "[a]lthough a defense of lack of subject matter jurisdiction may not be waived and may be asserted for the first time on appeal[,] a failure to join a necessary party does not result in a lack of jurisdiction over the subject matter of the proceeding." *Stancil v. Bruce Stancil Refrigeration, Inc.*, 81 N.C. App. 567, 574 (1986) (citing Wright & Miller, *Fed. Practice and Procedure: Civil* § 1392 (1969)), *disc. review denied*, 318 N.C. 418, (1986). Accordingly, and in alignment with our well-established prohibition of raising new issues on appeal, "[t]he defense of failure to join a necessary party must be raised before the trial court and may not be raised for the first time on appeal." *Phillips v. Orange County Health Dept.*, 237 N.C. App. 249, 255 (2017).

¶ 65 Here, defendant did not raise the issue of necessary joinder of the legislature under Rule 19(d) before the trial court. Further, neither defendant nor the appointed *amicus* counsel raised this issue before the Court of Appeals. Indeed, the first time that this issue was raised in this case was by the dissenting opinion below. *See M.E.*, 275 N.C. App. at 595 (Tyson, J., dissenting). Specifically, the Court of Appeals dissent cites this Court's ruling in *Booker v. Everhart*, 294 N.C. 146, 158 (1978), for the proposition that "neither the district court, nor [the Court of Appeals], can address the underlying merits of [p]laintiff's assertions until this mandatory joinder defect is cured." *M.E.*, 275 N.C. App. at 595 (Tyson, J., dissenting). In *Booker*, however, the defendants directly raised their

necessary joinder issue before the trial court by making a motion to dismiss under Rule 12(b)(7). *Booker*, 294 N.C. at 149. Here, contrastingly, the necessary joinder issue was raised neither by defendant nor by the trial court *ex meru motu* and was not mentioned until the Court of Appeals dissent. Accordingly, this issue is not properly before this Court, and we therefore decline to consider it. To the extent that *Booker* suggests that an *appellate* court must correct a necessary joinder defect *ex meru motu* before a ruling on the merits, it is overruled.

¶ 66 In any event, even assuming *arguendo* that mandatory joinder under Rule 19(d) may be raised for the first time on appeal, joining the legislative leaders is not required here because plaintiff's arguments do not fall within the purview of Rule 19(d). Rule 19(d) establishes that legislative leaders "must be joined as defendants in any civil action challenging the validity of a North Carolina statute or provision of the North Carolina Constitution under State or federal law." Here, contrastingly, plaintiff's complaint was brought under N.C.G.S. Chapter 50B for the sole purpose of obtaining a DVPO through a judicial proceeding under that chapter, not as an action challenging the facial validity of that statute. Although plaintiff asserted an as-applied constitutional defense in order to prevent the dismissal of her action, this alone does not convert her action seeking a DVPO into a "civil action challenging the validity of a North Carolina statute."

¶ 67 Accordingly, even if defendant's Rule 19(d) joinder argument could be raised for the first time on this appeal, it is meritless within the context of the present case.

III. Court of Appeals' Constitutional Ruling Undisturbed

¶ 68 Finally, we note that defendant has not challenged the Court of Appeals' substantive ruling on the merits of the constitutional issue. Accordingly, we do not address the Court of Appeals' ruling that Chapter 50B's exclusion of complainants in same-sex relationships from DVPO protection is unconstitutional as applied to plaintiff and those similarly situated, and this portion of the holding stands undisturbed.

IV. Conclusion

¶ 69 As explained above, we hold that the trial court acted within its broad discretion in exercising its jurisdiction over plaintiff's Chapter 50B DVPO complaint where plaintiff's amended form served as a functional Rule 60(b) motion for equitable relief from her mistaken or inadvertent dismissal filed thirty-nine minutes previously, and the Court of Appeals did not err in determining the same. Further, we hold that plaintiff's constitutional argument was properly preserved for appellate

review under Rule 10(a)(1). Next, we hold that defendant's Rule 19(d) necessary joinder argument is not properly before this Court, and in any event is meritless as intervention of legislative leaders, though optional, was not mandatory in the context of plaintiff's Chapter 50B complaint. Finally, we note that because the Court of Appeals' substantive constitutional ruling was not at issue before this court, its decision on this issue remains undisturbed.

MODIFIED AND AFFIRMED.

Justice BERGER dissenting.

¶ 70 The Rules of Civil Procedure "govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute." N.C.G.S. § 1A-1, Rule 1 (2021). These rules exist to provide order and certainty for all parties involved in civil litigation. There is a predictable outcome for this case if the Rules of Civil Procedure are respected. However, because the majority fails to adhere to these basic rules, and because the majority's newly crafted "mistaken or inadvertent dismissal" rule cannot be found in the Rules of Civil Procedure, I respectfully dissent.

¶ 71 A complaint seeking entry of a domestic violence protective order pursuant to Chapter 50B is a civil action. N.C.G.S. § 50B-2(a) (2021). "A civil action is commenced by filing a complaint with the court." N.C.G.S. § 1A-1, Rule 3(a) (2021). Any action or claim may be dismissed by the plaintiff without order of court by filing a notice of dismissal at any time before the plaintiff rests his case. N.C.G.S. § 1A-1, Rule 41(a) (2021).

¶ 72 "It is well settled that a Rule 41(a) dismissal strips the trial court of authority to enter further orders in the case, except as provided by Rule 41(d) which authorizes the court to enter specific orders apportioning and taxing costs." *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 593, 528 S.E.2d 568, 570 (2000) (cleaned up). "After a plaintiff takes a Rule 41(a) dismissal, there is nothing the defendant can do to fan the ashes of that action into life, and the court has no role to play." *Id.* (cleaned up). "A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity." *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964).

¶ 73 "An application to the court for an order shall be by motion which, unless made during a hearing or trial or at a session at which a cause is on the calendar for that session, shall be made in writing, shall state with

particularity the ground therefor, and shall set forth the relief or order sought." N.C.G.S. § 1A-1, Rule 7(b)(1) (2021). On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for mistake, inadvertence, surprise, or excusable neglect. N.C.G.S. § 1A-1, Rule 60(b) (2021). However, "[a] voluntary dismissal with prejudice, or a voluntary dismissal without prejudice, once a year has elapsed and the action cannot be refiled, constitutes a final adjudication subject to relief under [Rule 60(b)]." G. Gray Wilson, 2 *North Carolina Civil Procedur*e § 60-2 (4th ed. 2021) (footnotes omitted).

¶ 74 On May 31, 2018, plaintiff commenced her Chapter 50B action against defendant upon the filing of her "Complaint and Motion for Domestic Violence Protective Order." Later that day, plaintiff dismissed her Chapter 50B action against defendant by filing a notice of voluntary dismissal. Plaintiff's voluntary dismissal of the Chapter 50B action was filed eight minutes after she filed a Chapter 50C "Complaint for No-Contact Order for Stalking or Nonconsensual Sexual Conduct." Plaintiff subsequently attempted to withdraw the voluntary dismissal she had filed by striking through the paper with a diagonal line, writing the word "amended" at the top along with a sentence at the bottom explaining "I strike through this voluntary dismissal. I do not want to dismiss this action." Plaintiff filed these various documents pro se and the trial court granted her motion for a Chapter 50C temporary no-contact order, denied her motion for a Chapter 50B emergency DVPO, and set the matter for a plenary hearing on the merits for June 7, 2018. As defendant was not present at the initial hearing, she was not provided with notice of the complaints until after the May 31, 2018. Defendant was never served with the voluntary dismissal of the Chapter 50B action.

¶ 75 At the June 7, 2018, hearing, plaintiff was represented by two attorneys. Defendant did not file an answer to either complaint, appeared pro se, and did not raise any objections during the hearing. In fact, according to the transcript, defendant spoke just once during the hearing in which she acknowledged to the trial court her understanding of the Chapter 50C no-contact order. Despite the fact that plaintiff's voluntary dismissal had already "strip[ped] the trial court of authority," *Brisson*, 351 N.C. at 593, 528 S.E.2d at 570, over the Chapter 50B claim, the trial court entered an order dismissing the Chapter 50B complaint on other grounds and granted the Chapter 50C no-contact order.

¶ 76 The majority does not take issue with the trial court's lack of jurisdiction. Rather, the majority relies on the notion that trial courts have broad discretion to take any action within the law to ensure a fair and impartial trial "so long as he [or she] does not impinge upon [statutory]

restrictions." The majority further states that "[w]hen there is no statutory provision or well recognized rule applicable, the presiding judge is empowered to exercise his [or her] discretion in the interest of efficiency, practicality, and justice." One glaring gap in this logic, however, is that there *is* a statutory provision and well recognized rule such that a trial court's exercise of jurisdiction after a complaint has been voluntarily dismissed *does* impinge upon such statutory restrictions. *See* N.C.G.S. § 1A-1, Rule 41(a); *Brisson*, 351 N.C. at 593, 528 S.E.2d at 570.

¶ 77 According to the majority, plaintiff's voluntary dismissal "served as [a] functional Rule 60(b) motion through which the trial court could, and did, grant equitable relief." Untethered to the rules, the majority divines the intent of plaintiff, stating that "courts should not put themselves in the position of failing to recognize what is apparent to everyone else." Thus, the majority reasons, "[i]t was squarely within the discretion of the trial court to understand the plain intent of plaintiff's amended notice of voluntary dismissal as a Rule 60(b) motion for equitable relief or her amended Chapter 50B complaint as a functional refiling, and to subsequently exercise its jurisdiction." However, this approach is contrary to the Rules of Civil Procedure as plaintiff filed no motion with the Court, there was no final judgment, and her attorneys never requested the relief granted by the majority today. N.C.G.S. § 1A-1, Rule 7(b)(1), N.C.G.S. § 1A-1, Rule 60(b). The idea that plaintiff's filing was a motion pursuant to Rule 60(b) likely comes as a surprise to the trial court and both of plaintiff's counsel below. Nowhere in the transcript or the trial court's order is it intimated that the trial court "underst[ood] the plain intent of plaintiff's amended notice of voluntary dismissal as a Rule 60(b) motion for equitable relief or her amended Chapter 50B complaint as a functional refiling." Indeed, neither of plaintiff's attorneys argued before the trial court that the diagonal strikethrough and statement on the voluntary dismissal should in any way be considered as a Rule 60(b) motion. If neither the trial court nor plaintiff's lawyers recognized plaintiff's "mistaken or inadvertent dismissal" as a Rule 60(b) motion, it is difficult to comprehend how "every intelligent person underst[ood what was] meant." There plainly was never a subsequent motion filed by the plaintiff upon which the trial court could grant the relief allowed by the majority.

¶ 78 It is interesting that in one breath the majority claims there is "no doubt as to plaintiff's intentions" and in another, the majority concedes that it "cannot know precisely from the record whether the trial court considered [the amendment to the voluntary dismissal as a Rule 60(b) motion or a refiling of the Chapter 50B complaint] when it determined that it had jurisdiction." Further, according to the majority, plaintiff and

her counsel "likely did not" intend for her amendment to the voluntary dismissal or her amended Chapter 50B complaint to serve as a 60(b) motion or a formal refiling, respectively. Even assuming "every intelligent person" should understand what plaintiff intended based on documents in the court file, the majority is apparently uncertain itself about whether plaintiff was refiling her Chapter 50B complaint or requesting relief pursuant to Rule 60(b).[1]

¶ 79 Rule 60(b) is meant to relieve a party from a final judgment, order, or proceeding. N.C.G.S. § 1A-1, Rule 60(b). It strains credibility for this Court to contend that plaintiff's "inadvertent or mistaken voluntary dismissal" was in fact a Rule 60(b) motion as no final judgment had been entered, and plaintiff was ineligible for such relief under the plain wording of the rule. *See Robinson v. General Mills Restaurants, Inc.*, 110 N.C. App. 633, 637, 430 S.E.2d 696, 699, *review allowed* 334 N.C. 623, 435 S.E.2d 340 (1993), *review denied as improvidently granted* 335 N.C. 763, 440 S.E.2d 274 (1994) (holding that "once the one-year period for refiling an action has elapsed and the action can no longer be resurrected, the voluntary dismissal acts as a final adjudication for purposes of Rule 60(b)"); *see also* Wilson, 2 *North Carolina Civil Procedure* § 60-2 (footnotes omitted) (a voluntary dismissal is not a "final adjudication subject to relief under [Rule 60(b)]" unless "a year has elapsed and the action cannot be refiled[.]").

¶ 80 In reaching their decision, the majority ignores that the Rules of Civil Procedure apply to Chapter 50B proceedings. N.C.G.S. § 1A-1, Rule 1; N.C.G.S. § 50B-2(a). Instead, the majority bases its reasoning on the purpose of Chapter 50B — "provid[ing] a method for trial court judges or magistrates to quickly provide protection from the risk of acts of domestic violence by means of a process which is readily accessible to *pro se* complainants." While the purpose of the statute is important, it does not provide a license to ignore the Rules of Civil Procedure, or the due process rights of an adverse party.

¶ 81 The majority proclaims that "[p]laintiff here is exactly the type of complainant that the *pro se* provisions of Chapter 50B contemplate: one who is navigating the complex arena of legal procedure for the first time, without the assistance of legal counsel, soon after experiencing significant trauma." Notably, however, the majority fails to discuss that

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1. Treating plaintiff's voluntary dismissal as a new civil action disregards the filing requirements set forth in Rule 3; issuance of a summons as required by Rule 4; service requirements in Rule 5; and the fact that, if this were new action, the Clerk of Court would have assigned a separate file number.

plaintiff was represented by not one, but two attorneys at the hearing. *Cf. Brown v. Kindred Nursing Centers East, L.L.C.*, 364 N.C. 76, 84, 692 S.E.2d 87, 92 (2010) ("[I]t it well settled that 'the rules [of civil procedure] must be applied equally to all parties to a lawsuit, without regard to whether they are represented by counsel.' ").

¶ 82 Importantly, defendant never received notice that plaintiff had filed a voluntary dismissal in the Chapter 50B action. In addition, and unsurprisingly, defendant had no notice that the trial court was considering a Rule 60(b) motion, again, because plaintiff's two attorneys did not make the motion and the trial court did not rule on any such motion. The majority's professed concern for pro se litigants does not seem to apply to this defendant, who was, ironically, the only party to appear pro se.

¶ 83 The law going forward appears to be that, even if the Rules of Civil Procedure yield a particular result, trial courts are free reach a contrary outcome so long as an "intelligent person understands [what] is meant[.]" *But see Goins v. Puleo*, 350 N.C. 277, 281, 512 S.E.2d 748, 751 (1999) (stating that "the Rules of Civil Procedure promote the orderly and uniform administration of justice, and all litigants are entitled to rely on them"); *Pruitt v. Wood*, 199 N.C. 788, 790, 156 S.E. 126, 127 (1930) ("When litigants resort to the judiciary for the settlement of their disputes, they are invoking a public agency, and they should not forget that rules of procedure are necessary and must be observed[.]").

¶ 84 The Rules of Civil Procedure either apply or they don't. The rules provide certainty for all parties involved in civil litigation. By failing to adhere to these basic rules, the majority makes our system of justice less predictable and causes our law to become more unsettled. The majority's new "mistaken or inadvertent dismissal" rule is antithetical to our adversarial system and will disrupt the orderly flow of cases through our trial courts under the guise of "facilitat[ing] access to justice[.]" This is not a case in which the record shows that the parties and trial court knew that relief under Rule 60(b) was sought or where the trial court granted relief under Rule 60(b). Thus, the majority's approach shifts appellate review from the text of the rules and the arguments of the parties in the trial court to allow reverse engineered arguments based on sympathies and desired results.

Chief Justice NEWBY and Justice BARRINGER join in this dissenting opinion.

PONDER v. BEEN

[380 N.C. 570, 2022-NCSC-24]

MARK W. PONDER
v.
STEPHEN R. BEEN

No. 70A21

Filed 11 March 2022

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 275 N.C. App. 626, 853 S.E.2d 302 (2020), reversing an order entered on 29 October 2019 by Judge W. Robert Bell in Superior Court, Mecklenburg County. Heard in the Supreme Court on 15 February 2022.

Sodoma Law, by Amy Simpson, for plaintiff-appellant.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, and Claire Samuels Law, PLLC, by Claire J. Samuels, for defendant-appellee.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed.

REVERSED.

STATE v. MEDLIN

[380 N.C. 571, 2022-NCSC-25]

STATE OF NORTH CAROLINA
v.
JAMES GREGORY MEDLIN

No. 246PA21

Filed 11 March 2022

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review a divided decision of the Court of Appeals, 278 N.C. App. 345, 2021-NCCOA-313, holding no error in a judgment entered on 17 September 2019 by Judge Anna M. Wagoner in Superior Court, Cabarrus County. Heard in the Supreme Court on 14 February 2022.

Joshua H. Stein, Attorney General, by William F. Maddrey, Assistant Attorney General, for the State-appellee.

Sandra Payne Hagood, for defendant-appellant.

PER CURIAM.

¶ 1 North Carolina General Statutes Section 15A-1343(a) reads, in its entirety, as follows:

> In General. — The court may impose conditions of probation reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so.

N.C.G.S. § 15A-1343(a) (2021).

¶ 2 A challenged condition of probation imposed by a trial court is valid when it is reasonably related to a defendant's offense and reasonably related to his rehabilitation. *State v. Cooper*, 304 N.C. 180, 184 (1981). In the absence of proof to the contrary, it is presumed that a trial court acted with proper discretion with respect to a condition of probation imposed by the trial court. *State v. Smith*, 233 N.C. 68, 70 (1950). Further, the Court looks with favor upon the observation of the Court of Appeals that "[t]he [trial] court has substantial discretion in devising conditions under th[e] [probation statute]." *State v. Harrington*, 78 N.C. App. 39, 48 (1985).

¶ 3 In the present case, the trial court properly exercised its substantial discretion in devising and imposing special conditions of probation that were sufficiently reasonable in their relationship to defendant's rehabilitation. Consequently, without proof to the contrary, there was

no abuse of the discretion properly exercised here by the trial court in its specification of defendant's special conditions of probation. In determining a defendant's special conditions of probation and assuring their compatibility with one another as well as with the general conditions of probation, a trial court must exercise caution and vigilance to avoid inadvertent conflicts between and among the probationary conditions which are tailored for a defendant's rehabilitation pursuant to N.C.G.S. § 15A-1343.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
KELVIN ALPHONSO ALEXANDER

No. 234PA20

Filed 11 March 2022

Criminal Law—post-conviction DNA testing—availability after guilty plea—materiality

In a case arising from a fatal shooting in connection with a robbery, defendant's guilty plea to second-degree murder did not disqualify him from seeking post-conviction DNA testing pursuant to N.C.G.S. § 15A-269. Nevertheless, the trial court properly denied defendant's motion for post-conviction DNA testing of the shell casings and projectile found at the crime scene, where he failed to show that the test results would be material to his defense (according to credible eyewitness testimony, defendant was one of two people involved in the crime, and therefore the presence of another's DNA on the shell casings or projectile would not necessarily have exonerated him).

Chief Justice NEWBY concurring in the result.

Justice BARRINGER joins in this concurring opinion.

Justice EARLS concurring in part and dissenting in part.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 271 N.C. App. 77 (2020), affirming an order entered on 1 October 2018 by Judge Henry W. Hight, Jr., in Superior Court, Warren County, denying defendant's motion for postconviction DNA testing. Heard in the Supreme Court on 5 October 2021.

Joshua H. Stein, Attorney General, by Kristin J. Uicker, Assistant Attorney General, for the State-appellee.

Glenn Gerding, Appellate Defender, by Anne M. Gomez, Assistant Appellate Defender, for defendant-appellant.

Julie Boyer, Attorney at Law, by Julie C. Bower; Kelly M. Dermody; and Evan J. Ballan, for The Innocence Network, amicus curiae.

ERVIN, Justice.

¶ 1 This case arises from a motion for postconviction DNA testing pursuant to N.C.G.S. § 15A-269 filed by defendant Kelvin Alphonso Alexander over two decades after he entered a plea of guilty to second-degree murder. At the conclusion of a hearing held for the purpose of considering defendant's motion, the trial court entered an order denying defendant's request for postconviction DNA testing on the grounds that defendant had failed to show that the requested testing would be material to his defense. On appeal, we have been asked to determine (1) if defendants who are convicted on the basis of a guilty plea are entitled to obtain postconviction DNA testing pursuant to N.C.G.S. § 15A-269 and (2) if so, whether defendant made the necessary showing of materiality in this case. After careful consideration of the record in light of the applicable law, we affirm the decision of the Court of Appeals.

I. Factual Background

A. Substantive Facts

¶ 2 On the morning of 17 September 1992, Carl Boyd was found dead behind the counter of the Amoco service station that he managed in Norlina. After being dispatched to the Amoco station, Deputy Sheriff William H. Aiken of the Warren County Sheriff's Office, who was accompanied by Special Agent D.G. McDougall of the State Bureau of Investigation, discovered that Mr. Boyd had been shot multiple times. A subsequent autopsy revealed that Mr. Boyd had sustained four gunshot wounds to his back, abdomen, and forearm, with the medical examiner

having expressed the opinion that these wounds had been inflicted using a .22 caliber handgun.

¶ 3 In the course of their examination of the Amoco station, Deputy Aiken and Special Agent McDougall seized several items of evidence, including a .22 caliber projectile and three .22 caliber shell casings that were discovered on the service station floor. In addition, Special Agent McDougall collected eighteen latent print lifts from various parts of the service station. An SBI analyst later determined that these lifts contained five usable latent fingerprints and two usable latent palm prints and that three of the fingerprints belonged to Mr. Boyd and his wife. The firearm that had been used to kill Mr. Boyd was never recovered.

¶ 4 On 19 September 1992, Deputy Aiken interviewed Orlinda Lashley, who had been in the crowd outside the Amoco station while the investigating officers were there. According to a subsequent report prepared by Special Agent R.G. Sims of the State Bureau of Investigation, Ms. Lashley told Deputy Aiken that she had arrived at the Amoco station at approximately 7:15 a.m. and had been standing next to the gas tanks when she heard shouting, followed by two loud noises, emanating from the interior of the service station. At that point, according to Ms. Lashley, two men emerged from the front of the store, one of whom Ms. Lashley identified by name as defendant. As defendant emerged from the Amoco station, defendant told Ms. Lashley, "Hold it bitch, if you make a move, you're dead," after which he and the other man got into a vehicle that they were using and drove away. Ms. Lashley claimed to have left to go home before returning to the service station, in which she found Mr. Boyd, who died while holding her hands. After walking to another business across the street and contacting law enforcement officers, Ms. Lashley noticed that defendant was in the crowd that had gathered outside the Amoco station.

¶ 5 In light of the information that Ms. Lashley had provided, Deputy Aiken placed defendant under arrest. At the time that he was questioned by investigating officers, defendant denied having had any involvement in the killing of Mr. Boyd and claimed that he had been at home in bed at the time of the robbery and murder. Defendant did, on the other hand, admit to having gone to the Amoco station and to having stood outside while investigating officers were in the building, although he denied having ever entered the service station after Mr. Boyd began operating the business. Tanika Brown, the teenage daughter of defendant's father's girlfriend, who lived with defendant, told Special Agent Sims that defendant had been in bed on the morning of Mr. Boyd's death and that she had spoken to defendant at approximately 7:10 a.m. or 7:15 a.m. about

borrowing a gold chain from him given that school photographs were to be taken that day.

¶ 6 On 21 September 1992, Deputy Aiken and Special Agent Sims interviewed Ms. Lashley for a second time. Although the investigating officers showed her a photographic lineup that contained images of six suspects, including defendant, Ms. Lashley failed to identify any of the individuals depicted in the photographic array. At the time of defendant's sentencing hearing, Ms. Lashley explained that, even though she had recognized defendant's photo when she was shown the photographic lineup, she had not pointed him out because she had been asked to identify the second person that she had seen leaving the Amoco station rather than defendant. After the second interview, Ms. Lashley provided a formal statement describing what she had seen, which was handwritten by Special Agent Sims and which Ms. Lashley annotated and signed.

¶ 7 In this written statement, Ms. Lashley said that, after leaving the Amoco station, she had parked in a nearby driveway to clean herself and change her clothes,[1] at which point her "conscience was kicking in" and she "knew [she] had to go back." In light of this attack of conscience, Ms. Lashley said that she drove to the F&S Convenience Store, which was located across the street from the Amoco station, where she learned that Mr. Boyd had been shot. After determining that investigating officers and emergency medical personnel had been dispatched to the wrong location, Ms. Lashley claimed to have called 911 and informed the dispatcher that the officers and emergency medical personnel were needed at the Amoco station. According to Ms. Lashley, she accompanied the paramedics into the service station, where she saw Mr. Boyd's body, but did not "administer aid or touch him in any way." Ms. Lashley stated that she had not spoken to investigating officers at that time because she "was scared to death," that she had known defendant for "most of his life," that defendant had gone to school with her nephew, and that she knew defendant's father. Although she was shown the photographic lineup again at the conclusion of this second interview, Ms. Lashley again failed to identify any of the individuals who were depicted in that array.

¶ 8 On 20 October 1992, Special Agent McDougall interviewed Nell and Bonnie Ricks concerning a robbery that had occurred at a rest area located on Interstate 85 on the morning of Mr. Boyd's murder. At the time of that conversation, Mr. Ricks stated that, at approximately 7:00 a.m.,

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1. At defendant's sentencing hearing, Ms. Lashley testified that she was scared and had "lost control of her bladder."

he and his wife had stopped at the rest area, which Deputy Aiken claimed to be a "two or three minutes' drive" from the Amoco station, and that he was using the restroom when a Black male held him at gunpoint using what appeared to be a sawed-off shotgun or .22 caliber rifle and demanded to be given Mr. Ricks' wallet. After handing over his wallet to the assailant, Mr. Ricks remained in the restroom for another minute before returning to his car and calling law enforcement officers. Ms. Ricks told Special Agent McDougall that she had seen a Black man who was at least six feet tall, slender, and approximately twenty-five years old exit the rest area building and enter an older, medium-sized white car. Although Ms. Ricks was later shown a photographic lineup that contained defendant's image, Ms. Ricks did not identify anyone depicted in the lineup as the person that she had seen at the rest area.

B. Procedural History

¶ 9 On 19 October 1992, the Warren County grand jury returned bills of indictment charging defendant with first-degree murder and robbery with a dangerous weapon. In the course of pretrial proceedings, the prosecutor informed defendant's trial counsel that the State had a "credible eyewitness" who could identify defendant as Mr. Boyd's killer and that there was a "substantial possibility that [defendant] would be convicted of first-degree murder." The prosecutor did not, however, provide defendant's trial counsel with Ms. Lashley's name or give defendant's trial counsel access to either Special Agent Sims' report concerning Deputy Aiken's initial interview with Ms. Lashley or the handwritten statement that Ms. Lashley had annotated and signed at the time of her second interview.

¶ 10 The charges against defendant came on for trial before Judge Knox V. Jenkins, Jr., at the 15 November 1993 criminal session of Superior Court, Warren County. On 16 November 1993, during the process of selecting a death-qualified jury, defendant entered into a plea agreement with the State pursuant to which he agreed to plead guilty to second-degree murder in return for the dismissal of the robbery with a dangerous weapon charge, with sentencing to be left to Judge Jenkins' discretion. In addition, the State agreed to produce its eyewitness at the sentencing hearing, during which she could be cross-examined by defendant's trial counsel. After accepting defendant's guilty plea, Judge Jenkins scheduled a sentencing hearing for the following day.

¶ 11 In the course of the ensuing sentencing hearing, Ms. Lashley testified in a manner that was generally consistent with the written statement that she had signed and annotated at the time of her second interview

with the investigating officers. Among other things, Ms. Lashley reiterated that, after leaving the Amoco station, she had stopped to clean herself and change clothes before returning to the F&S Convenience Store and calling for emergency assistance and that she had only entered the Amoco station with the paramedics for a brief period of time before returning to the exterior of the building. Finally, Ms. Lashley testified that she had known defendant "[p]ractically all his life" and added that their families had been close for as long as she could remember.

¶ 12 Defendant's father, Willie Alexander, testified at the sentencing hearing concerning defendant's background and education without making any mention of defendant's whereabouts on the date of Mr. Boyd's death. In the course of his sentencing argument, defendant's trial counsel commented that Ms. Lashley had "presented a slightly different version" of what happened during the photo lineup proceedings, mentioned Ms. Lashley's assertion that she had not been asked to identify defendant, and highlighted testimony from a classmate of Ms. Lashley's nephew to the effect that, while he and defendant "may have [had] a slight crossing of paths" in high school, they had graduated four years apart. Finally, defendant's trial counsel pointed to Ms. Lashley's testimony that she had not lived in Warren County from 1977, when defendant was five years old, to 1990, when defendant was eighteen years old. Prior to announcing his sentencing decision, Judge Jenkins observed that, in light of her demeanor, manner, and appearance, he believed that Ms. Lashley had "an obvious lack of any interest, bias[,] or prejudice" and "appeared to be fair in her testimony." At the conclusion of the sentencing hearing and after finding the existence of two aggravating factors and no mitigating factors, Judge Jenkins entered a judgment sentencing defendant to a term of life imprisonment.

¶ 13 On 20 November 2002, defendant, who was proceeding *pro se*, filed a motion for appropriate relief in which he asserted claims for ineffective assistance of counsel and prosecutorial misconduct. On 4 April 2006, an evidentiary hearing was held before Judge R. Allen Baddour, Jr., for the purpose of considering the issues raised by defendant's motion for appropriate relief. At the 4 April 2006 hearing, the prosecutor testified that the State's case against defendant "rested almost exclusively on Ms. Lashley's identification" of defendant as one of the men whom she had seen leaving the Amoco station and that he "presumed" that, in the event that Ms. Lashley had been unable to identify defendant as one of the perpetrators of the murder, Judge Jenkins would have permitted defendant to withdraw his guilty plea.

¶ 14 Marvin Rooker, who served as one of defendant's trial attorneys, testified that, although he had been aware that there were some potential issues relating to Ms. Lashley's ability to identify defendant after viewing the photographic lineup, he believed that her testimony at the sentencing hearing had been "very credible" and that she had been "a good witness for the State." Frank Ballance, who served as defendant's other trial counsel, indicated that he had understood that defendant would have been allowed to withdraw his guilty plea in the event that the State's alleged eyewitness had failed to testify. Mr. Alexander testified that defendant had been at home at the time of Mr. Boyd's death and that he had told defendant's trial counsel about his availability as an alibi witness prior to the entry of defendant's guilty plea, with Mr. Rooker confirming that, even though he was aware of the possibility that defendant might be able to mount an alibi defense, defendant had elected to plead guilty anyway.

¶ 15 Dominic White, who had pled guilty to federal criminal charges in 2004 and remained in federal custody, testified that, while he was being debriefed by federal authorities, he had told them that, in 1992, his friend, John Terry, had confessed to having robbed and shot the owner of a convenience store in Warren County. Mr. White said that, while he and Mr. Terry had been driving through the area, Mr. Terry had stopped the car, run into the woods, and returned with what appeared to Mr. White to be a .22 caliber short-barrel assault rifle, which Mr. Terry claimed to have been the firearm used in the robbery and shooting. On the other hand, Mr. Terry, who also testified at the evidentiary hearing, denied having shot Mr. Boyd or told Mr. White that he had done so and claimed that he did not know defendant and had never met him.

¶ 16 On 8 January 2007, Judge Baddour entered an order denying defendant's motion for appropriate relief on the grounds that, at the time that defendant had entered his guilty plea, "he was fully aware that the State claimed it had an eyewitness" even though his trial counsel did not know the witness' identity and had not had time to investigate her story, with the purpose of her testimony at sentencing having been to allow defendant "the opportunity to assess her testimony and credibility." In addition, Judge Baddour determined that, by failing to seek to withdraw his guilty plea following Ms. Lashley's testimony, defendant had expressed satisfaction "with the nature and quality of the testimony of [Ms.] Lashley" and that, even if defendant's trial counsel had provided him with deficient representation in light of their failure to learn Ms. Lashley's identity until the time of the sentencing hearing, there was "no reasonable probability" that, in the absence of that error, defendant would not have entered a plea of guilty.

¶ 17 On 18 March 2016, defendant filed a motion seeking postconviction DNA testing pursuant to N.C.G.S. § 15A-269 in which he requested the entry of an order compelling the performance of DNA and fingerprint testing on the three shell casings and projectile that had been found in the Amoco station on the theory that, in the event that Mr. Terry's DNA or fingerprints could be detected on these items, such a result would exonerate defendant. On 1 October 2018, the trial court entered an order denying defendant's motion on the grounds that defendant had "failed to show that all the requirements of [N.C.G.S. §] 15A-269 ha[d] been met" and that "the evidence sought is not material in this post-conviction setting" given that "the firearm which fired the bullet that killed Carl Eugene Boyd has never been recovered and the requested DNA testing would not reveal the identity of who fired th[e] firearm [that] killed Carl Eugene Boyd." Defendant noted an appeal to the Court of Appeals from the trial court's order.

C. Court of Appeals Decision

¶ 18 In seeking relief from the trial court's order before the Court of Appeals, defendant contended that the trial court had erred by determining that the requested DNA evidence was not material. Arguing in reliance upon the Court of Appeals' earlier decision in *State v. Randall*, defendant asserted that the proper standard for assessing materiality in cases involving guilty pleas focused upon the extent to which "there is a reasonable probability that DNA testing would have produced a different outcome"—specifically, that the defendant "would not have pleaded guilty and otherwise would not have been found guilty." 259 N.C. App. 885, 887 (2018). Defendant contended that, had a third person's DNA had been found on the shell casings and projectile and defendant's DNA not been detected there, those results would have provided significant support for a conclusion that someone else had been involved in the commission of the crime that defendant had been convicted of committing. In defendant's view, had such evidence been available and had he known about the "numerous problems" that tended to undermine Ms. Lashley's identification testimony, there was a reasonable probability that he would not have entered a guilty plea. In addition, defendant asserted that there was a reasonable probability that, had he insisted upon going to trial instead of pleading guilty, he would not have been convicted given the newly available DNA evidence and the other exculpatory evidence that was available to him.

¶ 19 In response, the State contended that defendant was not entitled to seek postconviction DNA testing because he had entered a guilty plea. In the State's view, defendant's guilty plea deprived him of the ability to

make the necessary showing of materiality given that he had not presented a "defense" for purposes of N.C.G.S. § 15A-296(a)(1) and could not have obtained a "more favorable verdict" in the absence of a decision with respect to the issue of guilt rendered by a jury. In addition, the State asserted that the Court of Appeals' decision in *Randall* had been overruled in *State v. Sayre*, 255 N.C. App. 215 (2020), *aff'd per curiam*, 371 N.C. 468 (2018) (observing that, "by entering into plea agreement with the State and pleading guilty, [the] defendant presented no 'defense' pursuant to [N.C.G.S.] § 15A-269(a)(1)"). Finally, the State argued that, even if defendant's guilty plea did not preclude him from seeking postconviction DNA testing, he had failed to make the necessary showing of materiality given that the evidence of his guilt was overwhelming and given that the presence of a third party's DNA upon the relevant items of evidence "would show at best that someone other than [d]efendant touched the shell casings or projectile at some time [and] for some reason that need not have been related to the robbery-murder." In the same vein, the State noted that Mr. White's testimony, which had been given more than a decade after the entry of defendant's guilty plea, could not support a finding of materiality given that the evidence in question had not been available at the time that defendant pled guilty and was sentenced.

¶ 20 In rejecting the State's argument that a defendant who pleads guilty is not entitled to seek postconviction DNA testing pursuant to N.C.G.S. § 15A-269, the Court of Appeals concluded that its prior decision in *Randall* was controlling with respect to this issue and that "there may be rare situations where there is a reasonable probability that a defendant would not have pleaded guilty in the first instance and would have not otherwise been convicted had the results of DNA testing" been available at the time of the defendant's guilty plea. *State v. Alexander*, 271 N.C. App. 77, 79 (2020) (citing *Randall*, 259 N.C. App. at 887). After acknowledging that the use of the word "verdict" might tend to suggest that the General Assembly intended to limit the availability of postconviction DNA testing to cases in which the defendant had been convicted based upon a decision by a jury, the Court of Appeals concluded that "there is a strong counter-argument that the General Assembly did not intend for the word 'verdict' to be construed in such a strict, legal sense" and that the General Assembly had, instead, "intended for 'verdict' to be construed more broadly, to mean 'resolution,' 'judgment' or 'outcome' in a particular matter," particularly given that a decision to adopt the more restrictive reading upon which the State relied might lead to the absurd result that postconviction DNA testing would not be available to a defendant who had been convicted at the conclusion of a bench trial.

Id. at 80; *see id.* at 80 n. 1 (citing *State v. Hemphill*, 273 N.C. 388, 389 (1968); N.C.G.S. § 1A-1, Rule 52 (2015)). Finally, the Court of Appeals concluded that this Court's decision to affirm the Court of Appeals' decision in *Sayre* did not constitute acceptance of the State's position that postconviction DNA testing was not available to defendants who had been convicted on the basis of a guilty plea rather than a jury verdict because that question had not been before the Court in *Sayre*. *Id.* at 81.

¶ 21 After determining that defendant's guilty plea did not preclude him from seeking postconviction DNA testing, the Court of Appeals held that the trial court had correctly concluded that defendant had failed to make the necessary showing of materiality. *Id.* at 81–82. In support of this decision, the Court of Appeals pointed to the "substantial evidence of [d]efendant's guilt," including (1) Ms. Lashley's testimony; (2) defendant's admission that he had been at the Amoco station on the date of the murder; and (3) defendant's guilty plea. *Id.* In addition, the Court of Appeals concluded that the mere presence of a third party's DNA on the evidence that defendant sought to have tested did not necessarily exonerate him given the existence of a number of alternative explanations for the presence of a third party's DNA on that evidence. *Id.* at 82.

¶ 22 In a separate opinion concurring in the result, then-Judge Berger opined that defendants who had been convicted on the basis of a plea of guilty plea did not have the right to seek postconviction DNA testing. *Id.* at 82 (Berger, J., concurring). As an initial matter, Judge Berger disputed the validity of the Court of Appeals' determination that this Court's decision in *Sayre* was limited to the issue of materiality. *Id.* at 83–85. In addition, Judge Berger noted that, by pleading guilty, defendant had "waive[d] all defenses other than that the indictment charges no offense[,]" with the defenses that defendant had waived by entering a guilty plea having included the right to seek postconviction DNA testing. *Id.* at 85 (quoting *State v. Smith*, 279 N.C. 505, 506 (1971)). Judge Berger asserted that his colleagues had construed the term "verdict" in an excessively broad manner, that the relevant statutory expression should be understood in accordance with its "plain meaning," and that, in order for a defendant to make the necessary showing of materiality, "there must have been a verdict returned by a jury." *Id.* at 86–87. Finally, after noting that N.C.G.S. § 15A-269(b)(3) provides that a defendant seeking to obtain DNA testing must execute an affidavit of innocence, Judge Berger opined that "[a] defendant who, under oath, admits guilt to a charged offense, cannot thereafter provide a truthful affidavit of innocence" as required by N.C.G.S. § 15A-269(b)(3). *Id.* at 87. This Court allowed defendant's petition for discretionary review of the Court of Appeals' decision on 12 August 2020.

II. Substantive Legal Analysis

A. Standard of Review

¶ 23 This Court reviews decisions of the Court of Appeals for errors of law. N.C. R. App. P. 16(a); *State v. Melton*, 371 N.C. 750, 756 (2018). "In reviewing a denial of a motion for postconviction DNA testing, '[f]indings of fact are binding on this Court if they are supported by competent evidence and may not be disturbed absent an abuse of discretion.' " *State v. Lane*, 370 N.C. 508, 517 (2018) (alteration in original) (quoting *State v. Gardner*, 227 N.C. App. 364, 365–66 (2013)). "A trial court's determination of whether defendant's request for postconviction DNA testing is 'material' to his defense, as defined in N.C.G.S. § 15A-269(b)(2), is a conclusion of law, and thus we review de novo [a] trial court's conclusion that defendant failed to show the materiality of his request." *Id.* at 517–18.

B. Availability of Postconviction DNA Testing Following a Guilty Plea

¶ 24 According to N.C.G.S § 15A-269, a convicted defendant is entitled to obtain postconviction DNA testing of evidence that:

> (1) Is material to the defendant's defense.
>
> (2) Is related to the investigation or prosecution that resulted in the judgment.
>
> (3) Meets either of the following conditions:
>
> a. It was not DNA tested previously.
>
> b. It was tested previously, but the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.

N.C.G.S. § 15A-269(a) (2021). A trial court is required to allow a request for postconviction DNA testing in the event that the criteria specified in N.C.G.S. § 15A-269(a) have been established and that:

> (2) If the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant; and

(3) The defendant has signed a sworn affidavit of innocence.

N.C.G.S. § 15A-269(b). "Materiality" as used in the statutory provisions governing postconviction DNA testing should be understood in the same way that "materiality" is understood in *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, *Lane*, 370 N.C. at 519, with the relevant inquiry being whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

¶ 25 The initial issue that we need to address in evaluating the validity of defendant's challenge to the Court of Appeals' decision to uphold the trial court's order is whether our decision in *Sayre* should be understood to deprive defendants convicted on the basis of guilty pleas of the right to seek and obtain postconviction DNA testing even if they are otherwise able to satisfy the applicable statutory requirements. The majority at the Court of Appeals held in *Sayre* that the defendant's "bare assertion that testing the identified evidence would 'prove that [he] is not the perpetrator of the crimes' is not sufficiently specific to establish that the requested DNA testing would be material to his defense." *State v. Sayre*, No. COA17-68, 2017 WL 3480951, at *2 (N.C. Ct. App. Aug. 15, 2017) (unpublished). In addition, the Court of Appeals observed that, "by entering into a plea agreement with the State and pleading guilty, [the] defendant presented no 'defense' pursuant to [N.C.G.S.] § 15A-269(a)(1)" and did not have the right to seek or obtain postconviction DNA testing. *Id.* at *2. In light of his belief that defendant had, in fact, made a sufficient showing of "materiality," Judge Murphy dissented from his colleagues' decision and concluded that the case should have been remanded to the trial court for further proceedings. *Id.* at *3 (Murphy, J., dissenting). The defendant noted an appeal from the Court of Appeals' decision to this Court based upon Judge Murphy's dissent.

¶ 26 According to well-established North Carolina law, "[w]hen an appeal is taken pursuant to [N.C.G.S.] § 7A-30(2), the only issues properly before the Court are those on which the dissenting judge in the Court of Appeals based his dissent." *Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 463 (1984). In light of that fact, the only issue before this Court in *Sayre* was whether the defendant had sufficiently alleged that the performance of postconviction DNA testing would be "material." For that reason, our decision in *Sayre* did not address, much less resolve, the issue of whether a defendant whose conviction stemmed from a guilty plea is entitled to seek and obtain postconviction DNA testing. As a result, the extent to which a plea of guilty operates as a categorial bar to

postconviction DNA testing pursuant to N.C.G.S. § 15A-269 is a question of first impression for this Court.

¶ 27 In seeking to persuade us that defendants who have been convicted on the basis of a guilty plea are ineligible to seek postconviction DNA testing, the State contends that, "[u]nder the plain, unambiguous language of [N.C.G.S. §] 15A-269, a defendant who pled guilty cannot meet the statutory requirements that would entitle him to postconviction DNA testing." In the State's view, the statutory reference to a "verdict" demonstrates the General Assembly's intent that the only persons entitled to seek postconviction DNA testing are those who were convicted as the result of a jury verdict. According to the State, this relatively strict reading of the relevant statutory language would not exclude those found guilty at a bench trial from obtaining postconviction DNA testing given that N.C.G.S. § 15A-269 had been enacted in 2001, while criminal bench trials had not been authorized until 2013. As further support for this contention, the State directs our attention to several cases in which this Court used the term "verdict" to refer to the decision that the trial judge makes at the conclusion of a bench trial, *see, e.g.*, *State v. Puckett*, 299 N.C. 727, 727 (1980); *State v. Willis*, 285 N.C. 195, 197 (1974); *State v. Brooks*, 287 N.C. 392, 405 (1975), and a decision by the Court of Appeals describing the ruling made by a district court judge at the conclusion of a bench trial as a "verdict," *see State v. Surles*, 55 N.C. App. 179, 182 (1981). As a result, the State contends that "the standard [applicable to requests for postconviction DNA testing] does not apply to defendants who were convicted by means other than a factfinder's decision at a trial."

¶ 28 In addition, the State argues that, even though "[N.C.G.S. §] 15A-269(a)(1) presupposes that the defendant presented a 'defense' in order to evaluate whether the [DNA] evidence is relevant to that defense," "a defense was never presented" "when a defendant enters a plea of guilty." On the contrary, the State argues that, by pleading guilty, "the defendant admitted his guilt" and "waived all defenses" other than a challenge to the sufficiency of the indictment, including "his right to test the evidence before a jury." In other words, the State contends that the fact that the defendant entered a guilty plea demonstrates that he or she had no "defense" to which postconviction DNA testing could be material, with "[a]ny analysis of whether testing is material to [the d]efendant's 'defense' [in cases involving guilty pleas necessarily] begin[ning] with speculation as to what his defense was."

¶ 29 Aside from these arguments, which rely directly upon specific language that appears in N.C.G.S. § 15A-269, the State advances a number of prudential arguments in opposition to a decision to allow defendants

convicted on the basis of guilty pleas to seek and obtain postconviction DNA testing. For example, the State asserts that allowing such a defendant access to postconviction DNA testing would be inconsistent with the statutory requirement that a defendant seeking such testing "sign[ ] a sworn affidavit of innocence," N.C.G.S. § 15A-269(b)(3), on the theory that, in order "[t]o comply with this requirement, a defendant who pled guilty and swore himself to be 'in fact guilty' of the crime must either: (1) lie and swear he is innocent even though he knows he is not or (2) admit that his earlier statement of factual guilt was untrue." In addition, the State argues that "[t]here is no precedent binding in North Carolina that applies *Brady* to guilty pleas," a fact that the State believes to be "relevant because [N.C.G.S.] § 15A-269(b)(2) adopts the *Brady* standard" and "[t]he General Assembly is presumed to act 'with full knowledge of prior and existing law and its construction by the courts,' " *State v. Anthony*, 351 N.C. 611, 618 (2000). Similarly, the State argues that a defendant's decision to enter a guilty plea obviates the necessity for the State to make a full evidentiary presentation at trial, "mak[ing] it difficult[,] if not impossible[,] for any court to evaluate how potential DNA testing might affect the fact finder's assessment of the evidence." Finally, the State expresses concern about the possibility that defendants might engage in "gamesmanship" by pleading guilty in order to avoid the full development of a trial record before filing a subsequent motion for postconviction DNA testing pursuant to N.C.G.S. § 15A-269.

¶ 30 In seeking to persuade us to uphold the Court of Appeals' decision with respect to this issue, defendant argues, in reliance upon *Randall*, that, when the General Assembly enacted N.C.G.S. § 15A-269, it intended for defendants who were convicted based upon a plea of guilty to be able to seek post-conviction DNA testing. In support of this assertion, defendant directs our attention to the language of the statute, the practical consequences that will result from the differing ways in which the relevant statutory language can be construed, the remedial nature of the statute, the title of the legislation that enacted the statute, and the political and social context in which the statute was enacted. More specifically, defendant asserts that N.C.G.S. § 15A-269 was enacted during a period in which many individuals convicted of serious crimes were being exonerated through the use of modern DNA testing procedures, with the relevant statutory provisions having arisen from "concerns that there are people who have been convicted of serious crimes who are innocent." In light of the remedial nature of N.C.G.S. § 15A-269, defendant contends that its language "must not be given an interpretation that will result in injustice if it 'may reasonably be otherwise consistently construed with the intent of the act,' " *Nationwide Mut. Ins. Co.*, 293 N.C.

431, 440 (1977). According to defendant, interpreting N.C.G.S. § 15A-269 to exclude defendants whose convictions were based upon guilty pleas would result in significant injustice given that many defendants plead guilty in spite of the fact that they are factually innocent.

¶ 31 In defendant's view, nothing in the language of N.C.G.S. § 15A-269 expressly excludes defendants who plead guilty from seeking postconviction DNA testing, with the manner in which Judge Berger parsed the relevant statutory language having involved a failure to give appropriate regard to the "eminently reasonable" reading of the statute that the Court of Appeals adopted in *Randall* and having overlooked the fact that, even though "the [General Assembly] has amended N.C.G.S. § 15A-269 several times since its enactment," it "has chosen not to amend the statute in reaction to *Randall*." Furthermore, defendant contends that a strict reading of the term "verdict" would lead to the absurd result that any defendant convicted by a jury, but not a defendant convicted at a bench trial or a defendant who enters a plea of guilty in reliance upon the decision of the Supreme Court of the United States in *North Carolina v. Alford*, 400 U.S. 25 (1970), could successfully seek and obtain postconviction DNA testing by making the required statutory showing.

¶ 32 Defendant points out that his sentencing hearing took place prior to the recent enactment of criminal justice reform legislation and at a time when defendants had limited access to pre-trial discovery and when prosecutors were required to try a first-degree murder case capitally if the record contained evidence tending to show that at least one aggravating circumstance existed. In addition, defendant notes that, at the time that he entered his guilty plea, there was strong public support for the death penalty and a significant number of death sentences were being imposed. *See* Barbara O'Brien & Catherine M. Grosso, *Confronting Race: How a Confluence of Social Movements Convinced North Carolina to Go Where the* McCleskey *Court Wouldn't*, 2011 Mich. St. L. Rev. 463, 488 (2011); Cynthia F. Adcock, *The Twenty-Fifth Anniversary of Post-*Furman *Executions in North Carolina: A History of One Southern State's Evolving Standards of Decency*, 1 Elon L. Rev. 113, 131, 131 n. 96 (2009) (citations omitted). According to defendant, it was "against this backdrop that defendants charged with first-degree murder in the early 1990's who were actually innocent had to decide whether to plead guilty rather than roll the dice with a jury and the appellate courts."

¶ 33 Finally, defendant notes that he was not provided with either of Ms. Lashley's statements and that he did not know the identity of the State's eyewitness or the nature of her testimony prior to the sentencing hearing, so that he was left without "crucial information about the weakness

of the State's evidence" at the time that he entered his guilty plea even though, in light of the fact that the State had evidence tending to show the existence of at least two possible statutory aggravating circumstances,[2] his case had to be tried capitally. Defendant asserts that, despite the fact that he had "strongly and repeatedly proclaimed his innocence from the time of his arrest through the time of his plea," "the lack of almost any knowledge of the evidence against him, combined with the fact that he was facing the death penalty in a very death-prone state, could cause even the most resolute of defendants to crack under the pressure." As a result, for all of these reasons, defendant contends that defendants who enter guilty pleas should not be precluded from seeking and obtaining postconviction DNA testing pursuant to N.C.G.S. § 15A-269.

¶ 34 "The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209 (1990). Although the first step in determining legislative intent involves an examination of the "plain words of the statute," *Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656 (1991), "[l]egislative intent can be ascertained not only from the phraseology of the statute but also from the nature and purpose of the act and the consequences which would follow its construction one way or the other," *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 265 (1989) (citations omitted). As this Court has clearly stated, remedial statutes such as N.C.G.S. § 15A-269 "should be construed liberally, in a manner which assures fulfillment of the beneficial goals, for which [they were] enacted and which brings within [them] all cases fairly falling within its intended scope." *Burgess v. Joseph Schlitz Brewing Co.*, 298 N.C. 520, 524 (1979).

¶ 35 As defendant points out, nothing in the text of N.C.G.S. § 15A-269 expressly precludes defendants who have pleaded guilty from seeking postconviction DNA testing.[3] In addition, the relevant statutory

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2. The aggravating circumstances that the State might have had sufficient evidence to attempt to establish included that Mr. Boyd was killed during the commission of an armed robbery, *see* N.C.G.S. § 15A-2000(e)(5) (1992), and that the killing of Mr. Boyd "was committed for pecuniary gain," *see* N.C.G.S. § 15A-2000(e)(6) (1992). However, in accordance with this Court's decision in *State v. Quesinberry*, 319, N.C. 228, 238 (1987), the jury would have only been entitled to consider one of these two factors had it been called upon to determine whether defendant should have been sentenced to death.

3. The General Assembly does, of course, understand how to limit the rights of convicted criminal defendants who have entered pleas of guilty to seek relief from their convictions and related sentences on direct appeal. For example, N.C.G.S. § 15A-1444 limits the ability of a convicted criminal defendant who entered a plea of guilty to seek appellate review of his or her conviction as a matter of right by providing that such a defendant

language is not devoid of ambiguity. *See Winkler v. N.C. State Bd. of Plumbing*, 374 N.C. 726, 730 (2020) (describing an ambiguous statute as one that is "equally susceptible of multiple interpretations"). Although the presence of the term "verdict" in the relevant statutory language may suggest that the General Assembly did, in fact, primarily have jury trials in mind at the time that it drafted N.C.G.S. § 15A-269, we are unable to understand the term "verdict" to operate as a limitation upon the reach of postconviction DNA testing given the manner in which the statute, considered as a whole, is written and the circumstances that led to its enactment. *See State v. Winslow*, 274 Neb. 427, 434, 740 N.W.2d 794, 799 (2007) (concluding that, despite the reference to a "trial" in Nebraska's postconviction DNA testing statute, that statute, when considered "as a whole," indicates that the Nebraska legislature did not intend to limit the availability of postconviction DNA testing to persons who had been convicted at the conclusion of a contested trial on the issue of guilt or innocence). While the decision of a jury may be the quintessential example of what constitutes a "verdict," the fact that a "verdict" can consist of "an opinion or judgment," *New Oxford American Dictionary* 1921 (3d ed. 2010), or "[a]n expressed conclusion; a judgment or opinion," *American Heritage Dictionary* (5th ed. 2012), and the State's concession that the term "verdict" as used in N.C.G.S. § 15A-269(b)(2) can encompass more than "a jury's or decision on the factual issues of a case," *Verdict*, *Black's Law Dictionary* (11th ed. 2019), suggests that the term "verdict" can be understood in a broader sense as well. *See also id.* (recognizing that "verdict" can also be defined "loosely, in a nonjury trial, [as] a judge's resolution of the issues of a case" and that today the term "typically survives in contexts not involving a jury"). We have previously recognized that "[c]ourts may and often do consult dictionaries" to determine the ordinary meaning of words used in statutes and that

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may only contend on direct appeal that the evidence admitted at the sentencing hearing did not support the sentence imposed by the trial court or in the event that the trial court sentenced the defendant to a term of imprisonment that falls outside the presumptive range for a defendant convicted of committing an offense of the same class with the same prior record level, N.C.G.S. § 15A-1444(a1) (2021), and on the grounds that the trial court erred in ascertaining the defendant's prior record level or the trial court's judgment contained an unauthorized disposition or term of imprisonment. N.C.G.S. § 15A-1444(a2). Similarly, a defendant whose conviction rests upon a guilty or no contest plea may appeal the trial court's decision to deny his motion to withdraw his plea of guilty or no contest. N.C.G.S. § 15A-1444(e). Finally, a defendant convicted on the basis of a plea of guilty is entitled to appellate review of the trial court's decision to deny his or her motion to suppress unlawfully obtained evidence under certain circumstances. N.C.G.S. § 15A-979(b) (2021); *see also State v. Reynolds*, 298 N.C. 380, 397 (1979). Aside from these instances, however, a defendant convicted on the basis of a plea of guilty is only entitled to direct review in the appellate division by seeking the issuance of a writ of certiorari. N.C.G.S. § 15A-1444(a1).

such words "are construed in accordance with their ordinary meaning *unless some different meaning is definitively indicated by the context*." *State v. Ludlum*, 303 N.C. 666, 671 (1981) (emphasis added). As a result, the mere fact that the relevant statutory language speaks in terms of a "verdict" does not, without more, necessarily suggest that postconviction DNA testing is only available to situations in which the defendant's conviction stems from a decision on the merits of the issue of guilt or innocence by a trier of fact.

¶ 36 Similarly, we are not persuaded that the term "defense" as used in N.C.G.S. § 15A-269(a)(1) should be limited to the specific arguments that the defendant advanced before the trial court prior to his or her conviction. In ordinary parlance, a "defense" is nothing more than an "attempted justification or vindication of something." *New Oxford American Dictionary* 454 (3d ed. 2010). Although a "defense" can be understood as "[a] defendant's stated reason why the plaintiff or prosecutor has no valid case," it can also be understood as "[a] defendant's *method and strategy* in opposing the plaintiff or the prosecution," *Defense*, *Black's Law Dictionary* (11th ed. 2019) (emphasis added), with other sources having broadly defined the term as "any matter that the defendant will in practice raise," Glanville Williams, *Textbook of Criminal Law* 114 n.3 (1978); "[a] fact or law that provides a full or partial exoneration of the defendant against the charges or claims made in a lawsuit or prosecution," *American Heritage Dictionary* (5th ed. 2012); and "the method and collected facts adopted by a defendant to protect himself against a plaintiff's action," *Webster's Third Int'l Dictionary* (1961). Thus, the statutory reference to a "defense" is sufficiently broad to include any argument that might have been available to a defendant to preclude a conviction or establish guilt for a lesser offense.

¶ 37 The practicalities of the manner in which the criminal process functions provide additional grounds for believing that "defense" as used in N.C.G.S. § 15A-269 should be read broadly. Aside from the fact that a defendant may contemplate relying upon many possible defenses before settling upon one or more of them for use before the trial court, a defendant may ultimately decide to refrain from presenting any "defense" at all and to enter a plea of guilty for a number of reasons that do not hinge upon his or her actual guilt or innocence, including a concern that the risk of a conviction is so great that a guilty plea represents the best way to avoid the imposition of a more severe sentence. *See State v. Harbison*, 315 N.C. 175, 180 (1985) (recognizing that there are "situations where the evidence is so overwhelming that a plea of guilty is the best trial

strategy"). As a result, the mere fact that a particular defendant elects to enter a guilty plea does not mean that he or she had no defense and would not have been willing to assert it had additional evidence been available. *Cf. State v. Hewson*, 220 N.C. App. 117, 124 (2012) (assessing whether the requested DNA evidence would be material to a heat of passion defense, even though that defense had not been raised at trial).

¶ 38 A broader reading of the reference to a "defense" in N.C.G.S. § 15A-269(a)(1) than that contended for by the State is also supported by other portions of the relevant statutory language, which requires a litigant seek such testing to show that postconviction DNA testing "[i]s material to the defendant's defense" rather than to the defense that the defendant actually presented at trial. N.C.G.S. § 15A-269(a)(1). Put another way, the fact that N.C.G.S. § 269(a)(1) is couched in the present tense suggests a recognition on the part of the General Assembly that a defendant's "defense" may evolve in light of newly available DNA evidence. As a result, the statutory reference to the defendant's "defense" does not, without more, satisfy us that the General Assembly intended to limit the availability of postconviction DNA testing to defendants who were convicted at the conclusion of a contested trial on the issue of guilt or innocence.

¶ 39 The General Assembly enacted N.C.G.S. § 15A-269 by means of a piece of legislation entitled "An Act to Assist an Innocent Person Charged With or Wrongly Convicted of a Criminal Offense in Establishing the Person's Innocence." S.L. 2001-282, § 4, 2001 N.C. Sess. Laws 833, 837. As we have previously held, "even when the language of a statute is plain, 'the title of an act should be considered in ascertaining the intent of the legislature.' " *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 8 (2012) (quoting *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 812 (1999)). "[T]he title is part of the bill when introduced, being placed there by its author, and probably attracts more attention than any other part of the proposed law; and if it passes into law, the title thereof is consequently a legislative declaration of the tenor and object of the act." *State v. Keller*, 214 N.C. 447, 447 (1938). As the title to the relevant legislation makes clear, the General Assembly enacted N.C.G.S. § 15A-269 for the purpose of allowing wrongly convicted persons to assert and establish their innocence.

¶ 40 As of the date upon which the General Assembly enacted N.C.G.S. § 15A-269, a number of defendants who had been convicted of committing serious crimes had been exonerated as a result of DNA testing, a technology that had only become widely available in the relatively recent past. According to the National Registry of Exonerations, 102 people

across the United States had been exonerated as a result of DNA testing from 1989 to 2001, with three of these cases having involved North Carolina defendants,[4] one of whom had served four years in prison after having entering a plea of guilty to committing a sexual assault before DNA testing demonstrated that he did not commit that crime.[5]

¶ 41 Any argument that innocent people do not enter guilty pleas and that the General Assembly could not have intended to create a situation in which defendants were allowed to make conflicting sworn statements concerning their guilt or innocence fails for a number of reasons as well. Aside from the fact that at least one North Carolina defendant who had been convicted based upon his plea of guilty had been exonerated through the use of DNA testing even before enactment of N.C.G.S. § 15A-269, of the 2,997 documented cases since 1989 in which individuals who have been exonerated after having been wrongfully convicted, 672—or over 22 percent—involved guilty pleas,[6] with this number including thirteen cases arising in North Carolina, eight of whom were exonerated on the basis of DNA testing.[7] For that reason, the available evidence clearly suggests that innocent people do, in fact, enter guilty pleas.

¶ 42 An innocent person may plead guilty to the commission of a criminal offense for a number of perfectly understandable reasons. For example, an innocent defendant may elect to plead guilty to avoid the risks and uncertainties associated with a trial that may result in a more severe sentence than the one offered by the prosecutor pursuant to a plea agreement. *See* Corinna B. Lain, *Accuracy Where it Matters: Brady v. Maryland in the Plea Bargaining Context*, 80 Wash. U. L. Q. 1, 29 (2002) (observing that an innocent defendant may choose to "cut [his or her] losses" and plead guilty when he or she is "faced with an intolerably high estimate of the chance of conviction at trial"). As evidence of that fact, we note that a 2002 report by the North Carolina Sentencing and Policy Advisory

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4. National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx. The registry is a project of the Newkirk Center for Science & Society at the University of California-Irvine, the University of Michigan Law School, and the Michigan State University College of Law.

5. Profile of Keith Brown, National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3062 (last visited Mar. 2, 2022).

6. National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (apply filter for "Guilty Plea") (last visited March 2, 2022).

7. National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx. (apply filters for "North Carolina" and "Guilty Plea") (last visited March 2, 2022).

Commission, a body that provides recommendations to the General Assembly regarding sentencing legislation, found that defendants who enter guilty pleas "may get a shorter active sentence or avoid active time altogether by getting probation." N.C. Sent'g & Pol'y Advisory Comm'n, *Sentencing Practices Under North Carolina's Structured Sentencing Laws* 24 (2002) [hereinafter *Sentencing Practices*].[8] In addition, entering a guilty plea provides the defendant with "more control over the sentence" and facilitates an outcome that "is more predictable than what a judge and jury may decide to do." *Id.* Finally, defendants often plead guilty "out of pure fear" that they will be treated more harshly if they insist upon pleading not guilty and going to trial, Daina Borteck, Note, *Pleas for DNA Testing: Why Lawmakers Should Amend State Post-Conviction DNA Testing Statutes to Apply to Prisoners Who Pled Guilty*, 25 Cardozo L. Rev. 1429, 1440 (2004), as is evidenced by the Sentencing and Policy Advisory Commission's conclusion that "prosecutors are more likely to seek an aggravated sentence or to ask for consecutive sentences in cases that proceed through trial," *Sentencing Practices* at 24, despite the fact that a defendant has a constitutional right not to be penalized for exercising the right to plead not guilty and be tried by a jury of his or her peers, *State v. Maske*, 358 N.C 40, 61 (2004).

¶ 43 An innocent defendant may be particularly prone to enter a guilty plea in a potentially capital case like this one. As the Innocence Network points out in its amicus brief, an innocent defendant may be confronted with the difficult choice of "falsely plead[ing] guilty and serv[ing] time in prison, or risk[ing] execution," with "many understandably choos[ing] the guilty plea" when "[f]aced with that dilemma." Similarly, Judge Jed S. Rakoff of the United States District Court for the Southern District of New York has noted that the "plea bargain[ing] system, by creating such inordinate pressures to enter into plea bargains, appears to have led a significant number of defendants to plead guilty to crimes they never actually committed," with defendants charged with rape and murder having presumably done "so because, even though they were innocent, they faced the likelihood of being convicted of capital offenses and sought to avoid the death penalty, even at the price of life imprisonment." Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. Rev. of Books (Nov. 20, 2014).[9] As a result, an innocent defendant may well choose the relative

8. Available at https://www.nccourts.gov/assets/documents/publications/disparityreportforwebR_060209.pdf?1iTr9wYxjAeDSGBuk5MdRLfgFq0ELkz.

9. Available at https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/?lp_txn_id=1298990.

certainty of the more lenient sentence associated with the entry of a guilty plea to the risk of receiving a more severe one following a guilty verdict rendered at trial. Any decision to limit the scope of the relief that the General Assembly intended to make available by means of the enactment of N.C.G.S. § 15A-269 to those whose convictions resulted from decisions made at the conclusion of trials on the merits overlooks the extent to which innocent people can be wrongfully convicted after pleading guilty, with there being no reason that we can identify for the General Assembly to have decided that wrongfully convicted individuals who pled guilty should be treated differently than wrongfully convicted individuals who were incarcerated as the result of decisions made by juries or trial judges sitting without a jury.

¶ 44 Finally, a criminal defendant is not required to admit guilt as a precondition for entering a valid plea of guilty. Aside from the fact that nothing in N.C.G.S. § 15A-1022 requires the defendant to make such an admission, the Supreme Court of the United States clearly held in *Alford* that "[a]n individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." 400 U.S. at 37. As a result, we do not believe that precluding a convicted criminal defendant from seeking postconviction DNA testing pursuant to N.C.G.S. § 15A-269 serves any interest that the State might have in upholding that truthfulness of information submitted for a court's consideration, and that the concern that a defendant may execute an affidavit of innocence that conflicts with an earlier admission of guilt is insufficient, in our view, to justify a refusal to deprive a person who claims to have been wrongfully convicted of the right to seek and obtain postconviction DNA testing pursuant to N.C.G.S. § 15A-269.

¶ 45 The other prudential arguments that the State has advanced in support of a construction that denies the relief otherwise available pursuant to N.C.G.S. § 15A-269 to convicted defendants who enter guilty pleas do not strike us as persuasive either. As should be obvious, the most likely relief that a defendant who successfully obtains postconviction DNA testing that produces an exculpatory result can obtain will be the granting of a new trial. *See* N.C.G.S. § 15A-270(c) (2021). Although the ways of convicted criminal defendants are sometimes difficult to fathom, we find it hard to believe that such a person would enter a plea of guilty in order to improve his odds of procuring a new trial through the use of postconviction DNA testing given that he or she could have had a trial without subjecting himself or herself to the imposition of criminal sanction. For that reason, we do not find the State's expression of concern

about "gamesmanship" on the part of criminal defendants who elect to enter pleas of guilty to be particularly compelling.

¶ 46 The same is true of the State's contention that the General Assembly could not have intended for postconviction DNA testing to be made available to defendants who entered guilty pleas in light of the State's interest in the finality of criminal judgments and the fact that this Court has never held that *Brady* relief was available to defendants whose convictions rested upon pleas of guilty.[10] As an initial matter, we note that the State's interest in the finality of criminal judgments is not absolute; indeed, the existence of statutory provisions relating to motions for appropriate relief and postconviction DNA testing demonstrates the General Assembly's recognition that, on occasion, the State's interest in finality should give way to other considerations. Moreover, the General Assembly has required a defendant to make a materiality showing as a precondition for obtaining postconviction DNA testing in recognition of the importance of the finality interest upon which the State relies. *Lane*, 370 N.C. at 524 (stating that allowing DNA testing in the absence of a materiality requirement "would set a precedent for allowing criminal defendants to ceaselessly attack the finality of criminal convictions without significantly assisting in the search for truth"). In addition, it seems to us that, subject to any constitutional limitations that may otherwise exist, the General Assembly is free to adopt whatever standard for making postconviction DNA testing available to convicted criminal defendants that it thinks best and elected, in the exercise of its legislative authority, to use a *Brady*-based standard for that purpose in N.C.G.S. § 15A-269. *See Lane*, 370 N.C. at 519. Finally, the Supreme Court of the United States and other courts have successfully analyzed both materiality and the related concept of prejudice in the postconviction context in cases arising from guilty pleas. *See Hill v. Lockhart*, 474 U.S. 52, 58–59 (1985) (holding that, in order to make the showing of prejudice necessary to support an ineffective assistance of counsel claim in a guilty plea context, the defendant "must show that there is a reasonable probability that, but

10. Although the Supreme Court of the United States has not addressed the extent to which *Brady* claims can be asserted by defendants convicted on the basis of a guilty plea, at least three federal circuit courts have expressly allowed the assertion of such claims, *Sanchez v. United States*, 50 F.3d 1448, 1454 (9th Cir. 1995); *Miller v. Angliker*, 848 F.2d 1312, 1322 (2d Cir. 1988); *White v. United States*, 858 F.2d 416, 424 (8th Cir. 1988), with one circuit having reached the opposite conclusion, *United States v. Conroy*, 567 F.3d 174, 178 (5th Cir. 2009), and with other circuits having expressed uncertainty about the extent to which such claims are available without having explicitly prohibited them, *see United States v. Moussaoui*, 591 F.3d 263, 285 (4th Cir. 2010); *United States v. Mathur*, 624 F.3d 498, 506 (1st Cir. 2010).

for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial"); *see also Buffey v. Ballard*, 236 W. Va. 509, 515–16, 782 S.E.2d 204, 210–11 (2015) (holding that the State's failure to disclose certain DNA evidence violated the defendant's due process rights on the grounds that, if the evidence in question had been disclosed to the defendant, he would not have entered a guilty plea or been advised to do so by his attorney and would have been able to raise a reasonable doubt about his guilt at trial); *Miller*, 848 F.2d at 1322 (concluding that, "if there is a reasonable probability that but for the withholding of the information the accused would not have entered the recommended plea but would have insisted on going to a full trial, the withheld information is material" for purposes of *Brady*); *Sanchez*, 50 F.3d at 1454 (holding that "the issue in a case involving a guilty plea is whether there is a reasonable probability that but for the failure to disclose the *Brady* material, the defendant would have refused to plead and would have gone to trial"). As a result, aside from the fact that the General Assembly appears to have had an absolute right to adopt a *Brady*-based standard for use in determining whether a defendant who had been convicted as the result of a guilty plea was entitled to postconviction DNA testing, there is ample basis for concluding that such a standard can readily be applied in the guilty plea context and is frequently used in addressing the validity of similar claims.[11]

¶ 47 Finally, the State's expressions of concern about the difficulty of defeating a defendant's effort to make the required showing of materiality arising from the fact that the factual basis presentation that is necessary to support the acceptance of a guilty plea is less extensive than that needed to support a conviction at a contested trial on the merits and the risk that allowing defendants who entered guilty pleas to seek postconviction DNA testing will result in a flood of frivolous applications for such testing strike us as overstated. Although we acknowledge that our decision may well result in the filing of additional applications for

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11. The State's argument in reliance upon *Brady* appears to rest upon the assumption that, by holding that the use of a *Brady*-based materiality standard was inherent in N.C.G.S. § 15A-269, we incorporated the entirety of the Supreme Court's *Brady*-related jurisprudence in North Carolina's postconviction DNA testing statute. Any such assumption misreads our decision in *Lane*, which did nothing more than utilize a materiality standard deemed appropriate for use in evaluating claims arising from the State's failure to disclose exculpatory evidence to determine whether the defendant had made a sufficient showing to justify the entry of an order requiring postconviction DNA testing. As a result, the extent to which a convicted criminal defendant would have the ability to seek relief on the basis of *Brady* has no relevance to the proper resolution of the issue of whether a defendant who entered a guilty plea is entitled, in appropriate instances, to obtain postconviction DNA testing pursuant to N.C.G.S. § 15A-269.

postconviction DNA testing, the ability of the trial courts to summarily deny such applications in the event that the defendant fails to make an adequate initial showing of materiality should limit the resulting imposition upon the trial judiciary. In addition, we see no reason why the State should be precluded from submitting additional information bearing upon the issue of materiality in the event that the information contained in the existing record is not sufficient to permit the trial court to make an appropriate materiality determination.

¶ 48 As this Court has previously recognized, "[p]erhaps no interpretive fault is more common [in statutory construction cases] than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." *N.C. Dep't of Transp. v. Mission Battleground Park*, 370 N.C. 477, 483 (2018) (quoting Antonin Scalia & Bryan A. Gardner, *Reading Law: The Interpretation of Legal Texts* 167 (2012)). After conducting such a review, we hold that, when read in context and in light of its underlying purposes, N.C.G.S. § 15A-269 makes postconviction DNA testing available to individuals whose convictions rest upon guilty pleas in the event that those persons are otherwise able to satisfy the relevant statutory requirements. Any other construction of the relevant statutory language would thwart the General Assembly's apparent intent to ensure that individuals who claim to have been wrongfully convicted and are able to make a credible showing of innocence have the opportunity to take advantage of a technology that has the potential to both definitively acquit the innocent and convict the guilty. As a result, for all of these reasons, we hold that the Court of Appeals did not err in determining that a defendant who pleads guilty is not disqualified from seeking postconviction DNA testing pursuant to N.C.G.S. § 15A-269.

C. Materiality of DNA Evidence to Defendant's Defense

¶ 49 The final issue that must be addressed in evaluating the validity of defendant's challenge to the Court of Appeals' decision to uphold the denial of defendant's request for postconviction DNA testing is whether defendant made a sufficient showing of materiality, which requires defendant to demonstrate that, if the relevant evidence had been admitted at trial, "there exists a reasonable probability that the verdict would have been more favorable to the defendant." N.C.G.S. § 15A-269(a)–(b); *Lane*, 370 N.C. at 519; *see also State v. Byers*, 375 N.C. 386, 394 (2020) (construing "reasonable probability" to mean "a probability sufficient to undermine confidence in the outcome" (quoting *State v. Allen*, 360 N.C. 297, 316 (2006)). The required "materiality" determination should be made based

upon a consideration of the entire record and focus "upon whether the evidence would have affected the jury's deliberations," *Lane*, 370 N.C. at 519, with the applicable standard in guilty plea cases being whether "there is a reasonable probability that DNA testing would have produced a different outcome; for example, that [the] [d]efendant would not have pleaded guilty *and otherwise would not have been found guilty*," *Randall*, 259 N.C. App. at 887 (emphasis in original).

¶ 50 In seeking relief from the Court of Appeals' decision with respect to the materiality issue, defendant begins by arguing that the Court of Appeals erred by requiring him to "show that the requested testing necessarily would exclude his involvement in the crime." In addition, defendant contends that the Court of Appeals "failed to conduct its materiality analysis in the context of the entire record" by neglecting to consider "highly relevant facts concerning [defendant's] decision to plead guilty and the nature of the State's evidence," including the fact that defendant had "repeatedly proclaimed his innocence, went to trial, was very reluctant to plead guilty, and had a strong alibi." In light of the fact that he had an alibi and the fact that the State's case rested upon the testimony of a "single highly impeachable purported eyewitness," defendant asserts that it was reasonably probable that he would have been acquitted in the event that he was able to show the presence of third-party DNA on the shell casings and projectile found at the Amoco station.

¶ 51 According to defendant, the "reasonable probability" test applicable in postconviction DNA testing proceedings should be distinguished from both a "preponderance-of-the-evidence" test and a "sufficiency-of-the-evidence" test, with the Court of Appeals having erred by requiring him to show that "the presence of another's DNA or fingerprints on . . . [the] evidence would . . . necessarily exclude [his] involvement in the crime," *Alexander*, 271 N.C. App. at 82, given that this legal standard is "plainly inconsistent with the *Brady* standard of materiality this Court adopted in *Lane*." In addition, defendant contends that the Court of Appeals decided the "materiality" issue based upon what it believed to be "substantial evidence of [d]efendant's guilt," which consisted of (1) Ms. Lashley's eyewitness testimony; (2) defendant's admission to having been at the Amoco station during the investigation into the robbery and murder; and (3) the admission of guilt inherent in defendant's decision to plead guilty, *see Alexander*, 271 N.C. App. at 81–82, and argues that the Court of Appeals should have also considered (1) his continued protestations of innocence and his reluctance to plead guilty; (2) the fact that neither defendant nor his attorneys knew Ms. Lashley's identity before the entry of defendant's guilty plea; (3) his alibi evidence; (4) his

claim that he had not been permitted to enter an *Alford* plea; and (5) his claim that his trial counsel had pressured him to plead guilty and had told him that he would be released after serving ten years in the event that he pleaded guilty. As a result, defendant argues that, had the Court of Appeals conducted a proper materiality analysis, it would have determined that it was reasonably probable that he would not have entered a guilty plea in the event that he had been able to prove that third-party DNA had been detected on the shell casings and the projectile recovered from the Amoco station and that his own DNA had not been present on that evidence.

¶ 52 Similarly, defendant contends that, had he elected to plead not guilty and gone to trial, there is a reasonable probability that he would not have been convicted of second-degree murder. In defendant's view, the Court of Appeals erred by assuming that two people were involved in the robbery and murder of Mr. Boyd based upon Ms. Lashley's "highly suspect" testimony, having devoted a substantial portion of his brief to an attack upon Ms. Lashley's credibility that focused upon the conflicting accounts that Ms. Lashley gave of her activities on the day of the robbery and murder, her claims to have known defendant and his family for a lengthy period of time, and her failure to select defendant's image from the photographic array that was shown to her. As a result, defendant contends that "it is reasonably probable [that] the jury would have found that she did not witness anything at all; that she was only at the Amoco [station] after the fact; and that there was only one person involved in the crime," with evidence concerning the absence of defendant's DNA from the shell casings and projectile having a tendency to further undermine Ms. Lashley's credibility and corroborate his contention that Ms. Lashley did not actually see him leaving the Amoco station in the aftermath of the robbery and murder.

¶ 53 Aside from his reliance upon what he contends is the suspect quality of Ms. Lashley's testimony, defendant points to (1) the lack of forensic evidence linking him to the crime, (2) the existence of witnesses who could testify that he had been at home at the time of the murder, (3) the fact that another robbery during which a similar weapon was used had been committed in the vicinity of the Amoco station earlier that day, and (4) Mr. Terry's alleged admission to having robbed and killed Mr. Boyd. In addition, defendant argues that his presence at the Amoco station in the aftermath of the robbery and murder had no significance given that "Norlina is a small town where a murder would [have been] a rare event" and that "there were many other people that had gathered at the crime scene besides [defendant]." As a result, defendant claims that

"[t]here is more than a reasonable probability . . . that a jury would not have convicted [defendant] of [the] robbery and murder of [Mr.] Boyd" had third-party DNA been found on the shell casings and projectile and his own DNA not been detected.

¶ 54 In seeking to persuade us to uphold the Court of Appeals' decision with respect to the materiality issue, the State begins by arguing that, "[w]hile the [Court of Appeals] did say that the requested testing would not exclude [d]efendant from having been involved in the crime, it never said exclusion was the standard for showing materiality" and that the Court of Appeals had, instead, utilized the materiality standard articulated in *Lane*. According to the State, "[d]efendant himself [ ] introduced the idea that DNA testing would exclude him as the perpetrator when he stated in his motion that testing showing [Mr.] Terry's DNA would 'exculpate' him."

¶ 55 Secondly, the State contends that, even though "materiality is analyzed in the context of the entire record, the record is limited to only the evidence available at the time of the first trial." For that reason, the State contends that the only evidence that this Court can consider in addressing the materiality issue is the testimony of the witnesses who took the stand at the sentencing hearing, with the only sentencing hearing evidence that had any bearing upon the issue of defendant's guilt or innocence being the testimony of Ms. Lashley. In the State's view, defendant is not entitled to rely upon any of the reports generated by investigating officers and forensic experts prior to the entry of defendant's guilty plea on the grounds that "[n]o party authenticated, offered, or moved to admit these items into evidence at any proceeding" and that, even though "the reports very well may be authentic," this Court cannot speculate concerning the manner in which or extent to which any party might have used those reports at trial. In the same vein, the State contends that the Court cannot consider testimony from Mr. Alexander, defendant's father, or Ms. Brown, the daughter of Mr. Alexander's girlfriend, concerning defendant's location at the time of the robbery and murder given that they did not testify at defendant's sentencing hearing and that the Court should disregard Mr. White's testimony concerning Mr. Terry's alleged involvement in the robbery and murder given that Mr. White provided this information years after defendant entered his guilty plea.

¶ 56 Finally, the State argues that defendant cannot show that the requested DNA evidence is material given that "the State's eyewitness testimony identifying [d]efendant as one of the two robber-murders was overwhelming and favorable DNA test results would not contradict that evidence." According to the State, "the presence of DNA from someone

other than [d]efendant on a shell casing or projectile does not call into question [d]efendant's guilt" because "[s]uch results would show at best that someone other than [d]efendant touched the shell casings or projectile at some time for some reason that need not have been related to the robbery-murder." In addition, the State notes that Ms. Lashley had stated in all three of the accounts that she gave of her actions on the day of the robbery and murder that, after hearing gunshots, she had seen defendant and an unknown man leaving the Amoco station and that defendant had returned to the Amoco station later that day. The State describes Ms. Lashley's account of the relevant events as "internally consistent and . . . based on personal experiences that made her testimony believable," as even defendant's trial counsel had acknowledged. As a result, the State urges us to uphold the Court of Appeals' determination that defendant had failed to make the necessary showing of materiality.

¶ 57 A careful review of the Court of Appeals' opinion satisfies us that it did not misstate or misapply the applicable legal standard. After reciting the "reasonable probability" standard and noting that the burden of making the necessary showing of materiality rested upon defendant, the Court of Appeals stated that defendant had

> failed to show how it is reasonably probable that he would not [have] been convicted of at least second-degree murder based on the results of the DNA and fingerprint testing. That is, the presence of another's DNA or fingerprints on this or other evidence would not necessarily exclude [d]efendant's involvement in the crime. The presence of another's DNA or fingerprints could be explained by the possibility that someone else handled the casings/projectile prior to the crime or that the DNA or fingerprints are from [d]efendant's accomplice, as there were two involved in the murder.

Alexander, 271 N.C. at 81–82. As we read the quoted language, the Court of Appeals simply stated that defendant had to provide sufficient evidence that he was not involved in the commission of a second-degree murder in order to show materiality and that a showing of the presence of a third party's DNA on the shell casings and projectile did not, without more, tend to show that defendant had no involvement in the killing of Mr. Boyd.[12] Nothing in the Court of Appeals' opinion in any way

12. In the interest of clarity, we note that our references to the presence of third-party DNA on the shell casings and projectile recovered from the Amoco station assume that defendant's DNA is not detected on those items either.

suggests that a defendant seeking to obtain postconviction DNA testing is required to prove that, in the event of favorable test results, the State's evidence would have been insufficient to support a conviction or that the defendant would have definitely been acquitted. Instead, as the Court of Appeals noted, the inquiry that a court confronted with a request for postconviction DNA testing is required to conduct must focus upon whether it is "reasonably probable" that the outcome at trial would have been different. *See Bagley*, 473 U.S. at 682. As a result, we see nothing exceptional in the understanding of the applicable legal standard upon which the Court of Appeals relied in this case.

¶ 58 In addition, defendant has not satisfied us that the Court of Appeals failed to make its materiality decision "in the context of the entire record." *Lane*, 370 N.C. at 519 (quoting *State v. Howard*, 334 N.C. 602, 605 (1993)). The mere fact that the Court of Appeals did not address each and every piece of evidence presented by defendant does not mean that it failed to consider the entire record. Instead, as the Court of Appeals recognized, the fundamental problem with defendant's materiality argument is that it overlooks certain weaknesses in the evidence upon which he relies and fails to recognize that the evidence that he hopes to obtain from the performance of DNA testing upon the shell casings and projectile has very little bearing upon the issue of his own involvement in the robbery of the Amoco station and the killing of Mr. Boyd. Aside from the fact that the State did not need to show that defendant handled the weapon from which the fatal rounds were fired in order to establish his guilt, proof of the presence of third-party DNA on the shell casings and projectile would do nothing more than establish that, at some unspecified point in time, someone other than defendant touched these items, an event that could have happened before defendant or his accomplice obtained possession of the weapon or in the aftermath of the killing of Mr. Boyd at or before the time that the items were taken into the possession of the investigating officers.[13] As a result, since none of these explanations for the presence of third-party DNA on the shell casings and projectile would be in any way inconsistent with Ms. Lashley's contention that she saw two men, one of whom was defendant, leaving the Amoco station in the aftermath of the robbery and murder and since defendant would have been guilty of the murder of Mr. Boyd on an acting in concert theory in the event that he had been present for and participated in the commission of those crimes even if he had never

13. In view of the fact that the weapon from which the fatal shots were fired was never recovered, there is no way for postconviction DNA testing to shed any direct light upon the identity of the person who actually killed Mr. Boyd.

personally held the weapon from which the fatal shots were fired, *see State v. Barnes*, 345 N.C. 184, 233 (1997) (holding that, in the event that "two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose" (quoting *State v. Erlewine*, 328 N.C. 626, 637 (1991)), we are unable to determine that the performance of DNA testing on the shell casings and projectile recovered from the Amoco station would provide material evidence of defendant's innocence of second-degree murder.

¶ 59 In addition, we note that Judge Jenkins had the opportunity to hear Ms. Lashley's testimony during the sentencing hearing and stated that he found her "to be fair in her testimony" and that her testimony was "reasonable and consistent with other believable evidence in the case." Judge Jenkins' assessment of Ms. Lashley's credibility is reinforced by the actions of defendant's trial counsel, who made no effort to obtain authorization to seek the withdrawal of defendant's guilty plea after hearing Ms. Lashley testify on direct and cross-examination. *See State v. Handy*, 326 N.C. 532, 539 (1990) (listing "the strength of the State's proffer of evidence" as one of the factors that should be considered in deciding whether to allow a defendant to withdraw a guilty plea). Finally, we note that, despite the inconsistencies in the accounts that she gave of her activities on the morning of the robbery and murder, Ms. Lashley consistently asserted that she had visited the Amoco station on the morning in question, that she had heard a commotion inside the store, and that she had seen two men, one of whom was defendant, leave the service station. As a result, given the contemporaneous assessments of Ms. Lashley's testimony as credible; the fact that most, if not all, of the grounds for challenging the credibility of Ms. Lashley's account of her activities on the morning of the robbery and murder were known to defendant's trial counsel before the entry of judgment against defendant; and the fact that the DNA evidence that defendant seeks to obtain in this case would not tend to undercut the credibility of Ms. Lashley's contention that defendant was one of the two men that she saw outside the Amoco station, we cannot conclude that the performance of the requested DNA testing would have had a material effect upon defendant's or a jury's evaluation of Ms. Lashley's credibility at the time that Judge Jenkins entered judgment in this case.

¶ 60 We are also unpersuaded that the availability of evidence tending to provide defendant with an alibi controls the resolution of the materiality issue that is before us in this case. All of the witnesses whom defendant

claims can corroborate his alibi were available at the time that defendant decided to enter his guilty plea. In addition, the existence of evidence tending to show the presence of third-party DNA on the shell casings and projectile recovered from the Amoco station would not have had any additional impact upon an evaluation of the credibility of defendant's alibi witnesses given the fact that such evidence has little tendency to show that defendant was not involved in the robbery of the Amoco station and the murder of Mr. Boyd. The same is true of the evidence concerning the robbery at the rest area, which has no clear relation to the issue of defendant's guilt or innocence of the robbery of the Amoco station and the murder of Mr. Boyd, particularly given the absence of any non-hearsay evidence concerning Mr. Terry's involvement in the commission of the crime which led to the entry of defendant's guilty plea, the fact that Mr. Terry has denied any involvement in the commission of this crime, and the fact that evidence implicating Mr. Terry does not tend to exculpate defendant given Ms. Lashley's claim to have seen two men leaving the Amoco station. *See Barnes*, 345 N.C. at 233.[14]

¶ 61 At the end of the day, this case is not materially different from *Lane*, in which the defendant was convicted of the kidnapping, rape, and first-degree murder of a five-year-old girl. *Lane*, 370 N.C. at 509, 513–14. In seeking postconviction DNA testing of hair samples taken from the trash bag in which the victim's body was discovered, the defendant in *Lane* argued that DNA testing "could potentially relate to another perpetrator, and potentially the only perpetrator of [the] murder." *Id.* at 516. In rejecting the defendant's challenge to the trial court's determination that he had failed "to show that the requested postconviction DNA testing of hair samples [was] material to his defense," we pointed to "the additional overwhelming evidence of defendant's guilt presented at trial," the absence "of evidence at trial pointing to a second perpetrator," and "the inability of forensic testing to determine whether the hair samples at issue are relevant to establish a third party was involved" in the commission of the crimes for which the defendant was convicted. *Id.* at

14. We do agree with defendant that the Court of Appeals should not have considered the fact that he entered a guilty plea in making the required materiality determination or treated it as "substantial evidence" of guilt in light of the fact that the relevant issue for purposes of requests for postconviction DNA testing submitted by persons who entered guilty pleas is whether the new evidence would have impacted defendant's decision to plead guilty in the first place. The same is true, however, of defendant's persistence in proclaiming his innocence and his reluctance to enter a plea of guilty. Instead, the required materiality determination should focus upon the strength of the substantive evidence of defendant's guilt and the likely impact that the results of the requested DNA testing would have had upon defendant's decision to plead guilty and upon defendant's chances for success at a subsequent trial on the merits.

516–20. In determining that, "even if the hair samples in question were tested and found not to belong to the victim or defendant, they would not necessarily implicate another individual as a second perpetrator," we emphasized the fact that the defendant had not shown that the hair samples had been put into the trash bag at the time of the crime and that "there was great potential for contamination of the hole-ridden, weathered trash bag." *Id.* at 522. Although the evidence of defendant's guilt in this case is not as strong as the evidence of the defendant's guilt in *Lane*, the relevance of the requested DNA evidence in the two cases is strikingly similar and suggests that the two cases should be resolved in the same manner.

¶ 62 The ultimate question that must be decided in resolving the materiality issue that is before use in this case is whether, all else remaining the same, a favorable DNA test result would have (1) probably caused defendant to refrain from pleading guilty and (2) probably resulted in a verdict that was more favorable to defendant at any ensuing trial. After conducting the required analysis, we conclude that the presence of third-party DNA on the shell casings and projectile recovered from the Amoco station would have done little, if anything, to improve defendant's odds of achieving a more successful outcome than he actually obtained as a result of his guilty plea given the applicable legal standard, which focuses upon whether defendant actively participated in the robbery and murder that led to his conviction rather than upon whether defendant was the person that fired the fatal shots, and the fact that the availability of such evidence would had little tendency to show that defendant would have been better positioned to mount a successful defense to the charges that had been lodged against him or upon a jury's evaluation of the credibility and weight that should be given to the other available evidence, including the credibility of Ms. Lashley's testimony that she saw defendant leaving the Amoco station immediately after gunshots emanating from that location had been heard. As a result, we hold that the Court of Appeals did not err by concluding that defendant had failed to make the showing of materiality necessary to support an award of postconviction DNA testing.

III. Conclusion

¶ 63 Thus, for the reasons set forth above, we hold that a defendant who enters a plea of guilty is not statutorily disqualified from seeking postconviction DNA testing pursuant to N.C.G.S. § 15A-269. We further hold, however, that defendant has failed to establish that the requested DNA testing would be material to his defense in this case. As a result, the decision of the Court of Appeals is affirmed.

AFFIRMED.

Justice BERGER did not participate in the consideration or decision of this case.

Chief Justice NEWBY concurring in the result.

¶ 64 I agree with the majority's ultimate decision to uphold the trial court's denial of defendant's motion to test DNA evidence. I write separately, however, because I would hold that a defendant who pleads guilty cannot prevail on a postconviction motion to test DNA evidence under N.C.G.S. § 15A-269.[1] Therefore, I concur in the result.

¶ 65 N.C.G.S. § 15A-269 provides in relevant part:

> (a) A defendant may make a motion before the trial court that entered the judgment of conviction against the defendant for performance of DNA testing and, if testing complies with FBI requirements and the data meets NDIS criteria, profiles obtained from the testing shall be searched and/or uploaded to CODIS if the biological evidence meets all of the following conditions:
>
> (1) Is material *to the defendant's defense*.
>
> (2) Is related to the investigation or prosecution that resulted in the judgment.
>
> (3) Meets either of the following conditions:
>
> a. It was not DNA tested previously.
>
> b. It was tested previously, but the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.

1. Were I to reach the issue of whether defendant made the necessary showing of materiality in this case, I would agree with the majority's analysis, except for the majority's statement in footnote fourteen of its opinion.

> (b) The court shall grant the motion for DNA testing . . . upon its determination that:
>
> (1) The conditions set forth in subdivisions (1), (2), and (3) of subsection (a) of this section have been met;
>
> (2) If the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability *that the verdict would have been more favorable to the defendant*; and
>
> (3) The defendant has signed a sworn affidavit of innocence.

N.C.G.S. § 15A-269 (2021) (emphases added). "The primary endeavor of courts in construing a statute is to give effect to legislative intent. . . . If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 276–77 (2005) (citations omitted).

¶ 66 A plain reading of N.C.G.S. § 15A-269 demonstrates that a defendant who pleads guilty cannot meet the conditions necessary to prevail on a motion to test DNA evidence. First, a defendant who enters a guilty plea cannot show that "[i]f the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant." N.C.G.S. § 15A-269(b)(2). In order for a trier of fact to reach a verdict in a criminal case, there must first be a trial. *See State v. Hemphill*, 273 N.C. 388, 389, 160 S.E.2d 53, 55 (1968) ("A verdict is the unanimous decision made by the jury and reported to the court."). As such, the occurrence of a trial is a prerequisite to prevailing on a motion to test DNA evidence under N.C.G.S. § 15A-269(b)(2). When a defendant pleads guilty, no trial occurs, and thus no verdict is ever reached. Therefore, a defendant who pleads guilty can never meet the condition outlined in N.C.G.S. § 15A-269(b)(2).

¶ 67 Second, a defendant who enters a guilty plea cannot show that the relevant biological evidence "[i]s material to [his] defense." N.C.G.S. § 15A-269(a)(1). The phrase "material to the defendant's defense" presupposes that the defendant making the motion presented a defense before the trial court. Since a sample of biological evidence cannot be material to a defense that never occurred, a defendant who did not

present a defense before the trial court cannot meet the condition outlined in N.C.G.S. § 15A-269(a)(1).

¶ 68 When a defendant pleads guilty, he fails to present a "defense" pursuant to N.C.G.S. § 15A-269(a)(1). In *State v. Sayre*, the "defendant pleaded guilty to fourteen counts of taking indecent liberties with a child, two counts of second[-]degree sexual offense, and two counts of felony child abuse." *State v. Sayre*, No. COA17-68, 2017 WL 3480951, at *1 (N.C. Ct. App. Aug. 15, 2017) (unpublished). The defendant later filed a motion to test DNA evidence which the trial court denied. *Id.* The Court of Appeals noted that the "defendant's bare assertion that testing the identified evidence would 'prove that [he] is not the perpetrator of the crimes' is not sufficiently specific to establish that the requested DNA testing would be material to his defense." *Id.* at *2 (alteration in original) (citing *State v. Cox*, 245 N.C. App. 307, 312, 781 S.E.2d 865, 868–69 (2016)). The Court of Appeals also stated that "by entering into a plea agreement with the State and pleading guilty, defendant presented no 'defense' pursuant to N.C.[G.S.] § 15A-269(a)(1)." *Id.* As such, the Court of Appeals held "the trial court did not err by summarily denying defendant's request for post-conviction DNA testing." *Id.* The defendant appealed to this Court based upon the dissenting opinion at the Court of Appeals, and we issued a per curiam opinion affirming the Court of Appeals' decision. *State v. Sayre*, 371 N.C. 468, 818 S.E.2d 101 (2018) (per curiam).[2]

¶ 69 The majority asserts that the term "defense" is not "limited to the specific arguments that the defendant advanced before the trial court prior to his or her conviction." According to the majority, a "defense" includes "any argument that might have been available to a defendant to preclude a conviction or establish guilt for a lesser offense." The majority's primary support for this position is that the New Oxford American Dictionary broadly defines "defense" as an "attempted justification or vindication of something." More specifically, however, Black's Law Dictionary defines "defense" as "[a] defendant's *stated reason* why the . . . prosecutor has no valid case; esp., a defendant's . . . plea <her defense *was* that she was 25 miles from the building at the time of the

2. The majority asserts that our per curiam opinion did not affirm the Court of Appeals' statement regarding the defendant's presentation of a "defense" because that issue was not on appeal. Notably, however, in his brief before this Court, the defendant in *Sayre* argued that his guilty plea should not preclude him from establishing materiality. In response, the State argued that based upon the plain language of the statute, it is impossible for a defendant who pleads guilty to show materiality. Nevertheless, even if our decision did not affirm the Court of Appeals' statement, the statement is still persuasive.

robbery>." *Defense*, *Black's Law Dictionary* (11th ed. 2019) (emphases added). This definition makes clear that a defendant's "defense" refers to the arguments that he actually made at trial. *See id.* Nonetheless, the majority adopts an overbroad definition of "defense" in an effort to expand the applicability of N.C.G.S. § 15A-269. The majority's interpretation effectively changes the statutory language from "material to the defendant's defense," N.C.G.S. § 15A-269(a)(1), to "material to any defense the defendant possibly could have presented, whether actually raised or not." Such an interpretation disregards this Court's duty to give "the words [of a statute] their plain and definite meaning." *Beck*, 359 N.C. at 614, 614 S.E.2d at 277.

¶ 70 Defendant here entered a guilty plea and indicated to the trial court that he was "in fact guilty." Due to defendant's guilty plea, a trier of fact did not reach a "verdict," and defendant never provided a "defense." Since defendant cannot meet the conditions outlined in N.C.G.S. § 15A- 269(a)(1) and (b)(2), he is precluded from prevailing on his motion to test DNA evidence. Therefore, I concur in the result.

Justice BARRINGER joins in this concurring opinion.

Justice EARLS concurring in part and dissenting in part.

¶ 71 I concur fully in the portion of the majority opinion holding that defendants who enter a guilty plea are eligible to seek postconviction DNA testing under N.C.G.S. § 15A-269. In addition to the majority's careful and correct examination of the statutory text, the circumstances surrounding the statute's enactment, and the abundant evidence of legislative intent, the majority's description of the practical realities as experienced by criminal defendants faced with the choice between entering a guilty plea and going to trial illustrates why a statute titled "An Act to Assist an Innocent Person Charged With or Wrongly Convicted of a Criminal Offense in Establishing the Person's Innocence" cannot be read to categorically exclude defendants who have pleaded guilty. S.L. 2001-282, § 4, 2001 N.C. Sess. Laws 833, 837.

¶ 72 The majority notes that defendants " 'fear' that they will be treated more harshly if they insist upon pleading not guilty and going to trial." There is reason to believe defendants' fears are well-founded. *See*, *e.g.*, Brian D. Johnson, *Plea-Trial Differences in Federal Punishment: Research and Policy Implications*, 31 Fed. Sent. R. 256, 257 (2019) ("On average, trial conviction increases the odds of incarceration by two to six times and produces sentence lengths that are 20 to 60 percent longer.

. . . Federal defendants are typically two to three times more likely to go to prison and receive incarceration terms from one-sixth to two-thirds longer, even after adjusting for other relevant sentencing criteria. . . . [T]rial cases are twice as likely to result in imprisonment, with average sentences that are more than 50 percent longer." (citations omitted)); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 923 (2004) ("At sentencing, trial judges are conditioned to punish defendants for claiming innocence (the logical extension of not accepting the prosecutor's plea bargain and sparing the State the expense of a jury trial) and for failing to express remorse or apologize for his wrongdoings."). Further, there is evidence that defendants who have experienced trauma or have been victimized themselves may be especially susceptible to pressure to plead guilty, even believing at the time that they are at fault despite there being legally cognizable defenses to exonerate them. *See* Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 Am. Crim. L. Rev. 1123, 1125 n.8 (2005) ("Some defendants fail to assist in their defense or are willing to plead guilty because they are afraid, because they have no confidence in defense counsel, because they are trying to spare their loved ones the trauma of trial, or because they are mentally challenged."). As Justice Scalia observed, the plea-bargaining system "presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense." *Lafler v. Cooper*, 566 U.S. 156, 185 (2012) (Scalia, J., dissenting). Thus, it should be no surprise that, for entirely rational and comprehensible reasons, actually innocent people plead guilty. *See*, *e.g.*, Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 150–53 (2011) (noting that of the first 330 DNA exonerations, eight percent, or twenty-seven, had pleaded guilty).

¶ 73 Against this backdrop, it is fallacious to contend that allowing a defendant who has previously pleaded guilty to assert actual innocence would "make 'a mockery' of the General Assembly's postconviction DNA procedure." Our criminal justice system seeks finality, but it makes no pretenses to infallibility. Depriving defendants with credible actual innocence claims of an opportunity to demonstrate their innocence on the basis of a strained interpretation of a remedial statute is inconsistent with that statute and with the values our criminal justice system strives to uphold. Of course, the State has an interest in enforcing procedural mechanisms designed to filter out frivolous claims in order to promote the efficient administration of justice. But ultimately, the point is to administer *justice*, and there is no justice in consigning an actually

innocent defendant to a life in prison or worse. To imply that such a defendant deserves his fate because he was one of the overwhelming majority of criminal defendants who resolve their case through plea bargaining is willfully blind to reality and to the problems the General Assembly set out to address in enacting N.C.G.S. § 15A-269.

¶ 74 However, while I agree with the majority that defendants who plead guilty are not categorically ineligible for postconviction DNA testing under N.C.G.S. § 15A-269, I cannot join the majority in its conclusion that this defendant has failed to demonstrate materiality within the meaning of the statute. The majority is correct that N.C.G.S. § 15A-269(b) requires Alexander to demonstrate "a reasonable probability that the verdict would have been more favorable to the defendant" if the DNA evidence he seeks had been admitted at a trial. But the majority errs in its application of this standard in the present case.

¶ 75 Alexander did not, as the majority suggests, need to "provide sufficient evidence that he was not involved in the commission of second-degree murder in order to show materiality"—that is, the burden was not on Alexander to exculpate himself in order to establish his entitlement to DNA testing. At this stage of proceedings, under N.C.G.S. § 15A-269, a court is not deciding whether Alexander is actually innocent and should be released. The court is only deciding whether to allow postconviction DNA testing. Thus, in assessing materiality, the court considers the potential impact of the evidence had the evidence been available at the time Alexander entered his guilty plea, and at a subsequent trial where the burden would be on the State to prove his guilt beyond a reasonable doubt. If there is a reasonable probability that admission of the requested DNA evidence would cause Alexander not to plead guilty to second-degree murder and cause a jury not to find Alexander guilty of that crime, then he has satisfied his burden of proving materiality, regardless of whether or not he has brought forth affirmative evidence of his innocence at this time.

¶ 76 The majority correctly explains that " '[m]ateriality' as used in the statutory provisions governing postconviction DNA testing should be understood in the same way that 'materiality' is understood in *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny." Yet the majority's application of the materiality standard in this case imposes a significantly heavier burden on Alexander than what *Brady* and its progeny require. For example, in *Kyles v. Whitley*, the United States Supreme Court explained that evidence can be material within the meaning of *Brady* even if it does not establish that there is insufficient evidence to sustain a defendant's conviction. 514 U.S. 419, 434–35 (1995) ("[M]ateriality . . . is not

a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict."). A defendant must demonstrate that the evidence creates "[t]he possibility of an acquittal on a criminal charge," not that there is "an insufficient evidentiary basis to convict." *Id.* at 435. Requiring defendants to prove their innocence at this stage of the proceedings is simply inconsistent with the materiality standard the majority purports to apply and its purpose, which is to weed out frivolous claims.

¶ 77 Applying the proper materiality standard, I would hold that Alexander has demonstrated a reasonable probability that he "would not have pleaded guilty and otherwise would not have been found guilty." *State v. Randall*, 259 N.C. App. 885, 887 (2018) (emphasis omitted). In assessing materiality, we assess the impact of the DNA evidence "in the context of the entire record." *State v. Lane*, 370 N.C. 508, 519 (2018) (quoting *State v. Howard*, 334 N.C. 602, 605 (1993)). Here, the "context of the entire record" makes clear that the presence of another person's fingerprints on shell casings and a bullet found at the scene of Carl Boyd's killing is material within the meaning of N.C.G.S. § 15A-269.

¶ 78 With respect to Alexander's guilty plea, a court "is obligated to consider the facts surrounding a defendant's decision to plead guilty in addition to other evidence, in the context of the entire record of the case, in order to determine whether the evidence is 'material.' " *Randall*, 259 N.C. App. at 887. In this case, it is salient that at the time he pleaded guilty, Alexander was facing the death penalty, had no insight into potential weaknesses in the State's case, had an alibi defense corroborated by witness testimony, and was under the impression that he would serve ten years in prison if he agreed to the plea bargain being offered. What Alexander lacked at the time he entered his plea was any physical evidence tending to detract from the State's theory of the case that he was the shooter. Absent such evidence, the pressure to plead guilty rather than face a capital trial was overwhelming, regardless of the strength or weakness of the State's case. With DNA evidence that would, at a minimum, provide some evidentiary basis for Alexander's assertion that someone other than him was the shooter, there is a significantly greater chance that he would have been willing to forego the plea bargain and take his chances at trial. Alternatively, evidence tending to detract from the State's theory of guilt might have caused prosecutors to offer a plea bargain presenting Alexander with more favorable terms on less serious charges.

¶ 79 Had Alexander proceeded to trial, DNA evidence demonstrating that another person handled shell casings and a projectile found at the

crime scene would likely have had a significant effect on the jury's deliberations. *See Lane*, 370 N.C. at 519 ("The determination of materiality . . . hinges upon whether the evidence would have affected the jury's deliberations."). Again, while the presence of third-party DNA on the shell casings and projectile would not exclude the possibility that Alexander shot Boyd, it could reasonably have caused the jury to doubt the State's account of how Alexander supposedly perpetrated the crime, especially if Alexander's DNA was also not found on the shell casings and projectile. The majority's rejoinder is that Alexander still could have been convicted on an acting in concert theory of guilt "even if he had never personally held the weapon from which the fatal shots were fired," but there is at present no evidence in the record indicating that Alexander joined with another person "in a purpose to commit a crime." *State v. Barnes*, 345 N.C. 184, 233 (1997) (quoting *State v. Erlewine*, 328 N.C. 626, 637 (1991)). The State may have ultimately been able to negate the impact of the DNA evidence and secure Alexander's conviction for second-degree murder on an acting in concert theory, but it should be obvious that physical evidence supporting the inference that someone other than Alexander pulled the trigger would be extremely relevant in Alexander's trial for second-degree murder.

¶ 80 The DNA evidence Alexander seeks would, if it shows what he believes it shows, provide evidentiary support for the reasonable determination that someone other than Alexander was the shooter. The evidence would not conclusively establish Alexander's innocence, but that is not the burden he must carry at this stage. Instead, he must only demonstrate that with the DNA evidence he seeks there would have been a reasonable probability that he would not have pleaded guilty to second-degree murder and would not have been convicted of the same had he proceeded to trial. Here, given that the State's case was not overwhelming, DNA testing "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 419. Accordingly, while I agree with the majority that Alexander and all defendants who plead guilty are eligible to seek DNA testing under N.C.G.S. § 15A-269, I would hold that evidence which could support the inference that a defendant convicted of second-degree murder was not the shooter is material within the meaning of that statute. Accordingly, I respectfully concur in part and dissent in part.

STATE v. OLDROYD

[380 N.C. 613, 2022-NCSC-27]

STATE OF NORTH CAROLINA
v.
MARC PETERSON OLDROYD

No. 260A20

Filed 11 March 2022

Indictment and Information—attempted armed robbery—victims not specifically named—pleading requirements

An indictment for attempted armed robbery was not fatally defective where it designated "employees of the Huddle House located at 1538 NC Highway 67 Jonesville, NC" as victims without specifically naming them. The indictment satisfied the criminal pleading requirements set forth in N.C.G.S. § 15A-924(a)(5) (requiring a plain and concise statement asserting facts supporting each element of the crime), and it did not fail to protect defendant from double jeopardy by omitting the victims' names, especially where the Criminal Procedure Act had relaxed the stricter common law pleading rules. In fact, the reference to a particular group of people protected defendant from any future prosecutions involving any individual from that group.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 271 N.C. App. 544 (2020), reversing a trial court order denying defendant's Motion for Appropriate Relief entered on 9 March 2017 by Judge Michael D. Duncan in Superior Court, Yadkin County, and vacating and remanding a consolidated judgment entered on 2 June 2014 by Judge William Z. Wood Jr. in Superior Court, Yadkin County. Heard in the Supreme Court on 31 August 2021.

Joshua H. Stein, *Attorney General*, *by Ryan Y. Park*, *Solicitor General*, *Sarah G. Boyce*, *Deputy Solicitor General*, *and Heyward Earnhardt*, *Solicitor General Fellow*, *for the State-appellant.*

Glenn Gerding, *Appellate Defender*, *by Emily Holmes Davis*, *Assistant Appellate Defender*, *for defendant-appellee.*

MORGAN, Justice.

¶ 1 A Yadkin County Grand Jury indicted defendant for first-degree murder, attempted robbery with a dangerous weapon, and conspiracy to

commit robbery with a dangerous weapon on 28 January 2013. Defendant pleaded guilty to the reduced charge of second-degree murder as well as the two robbery charges. Defendant filed a Motion for Appropriate Relief (MAR) and a Supplemental Motion for Appropriate Relief (Supplemental MAR), asserting that the indictment which charged him with the offense of attempted robbery with a dangerous weapon was fatally flawed because it did not include the name of a victim. Both motions were denied by the trial court. Defendant sought and obtained appellate review of these denials. He renewed his position in the Court of Appeals concerning the deficiencies of the charging instrument. A majority of the lower appellate court agreed with defendant in a divided decision, holding that the indictment's description of the victims of defendant's attempted robbery as the "employees of the Huddle House located at 1538 NC Highway 67, Jonesville, North Carolina" was insufficient because the indictment did not comply with the requirement that this Court enunciated in *State v. Scott*, 237 N.C. 432, 433 (1953) that the name of the person against whom the offense was directed be stated with exactitude. *State v. Oldroyd*, 271 N.C. App. 544, 551 (2020). Because the indictment at issue in the present case satisfies the dual purposes of (1) informing defendant of the specific crime that he was accused of committing in order to allow him to prepare a defense, and (2) protecting defendant from being twice put in jeopardy for the alleged commission of the same offense, we reverse the decision of the Court of Appeals.

I. Factual and Procedural Background

¶ 2 Defendant, Scott Sica, and Brian Whitaker devised a plan to conduct a 5 October 1996 robbery of the Huddle House restaurant in Jonesville. The plan called for the men to visit a car dealership and to ask to take one of the dealership's vehicles for a test drive. During this test drive, whomever among the three men operated the vehicle would switch a fake key for the vehicle's actual key. After returning to the dealership with the vehicle and having the driver to hand over the fake key as if it were the vehicle's real key, defendant and his two counterparts would then return to the car dealership after it had closed so that the men could ride away in the vehicle that had been used for the supposed test drive. Next in the plan, Sica and Whitaker would drive to the Huddle House establishment in the stolen vehicle to commit the robbery, while defendant would be positioned nearby in Whitaker's green Dodge pickup truck in order to immediately join Sica and Whitaker after the completion of the robbery. The trio would then abandon the vehicle stolen from the car dealership and complete their getaway in the green Dodge pickup truck.

¶ 3 On 1 October 1996, in accordance with the criminal plan, two of the men stole a red Dodge pickup truck from a car dealership in West Virginia. Defendant, Sica, and Whitaker proceeded to Jonesville on 5 October 1996. Sica and Whitaker went to the Huddle House to commit the robbery, while defendant waited in the green Dodge pickup truck at a nearby meeting place where Sica and Whitaker would abandon the stolen red Dodge pickup truck and then enter the green Dodge pickup truck to execute their escape. Sica and Whitaker arrived at the Huddle House as planned and parked behind the business, armed with a 9mm Beretta handgun and a .357 revolver. The two men observed an open door at the back of the restaurant, but a group of Huddle House employees soon exited the establishment and closed the door behind them. Sica got out of the red Dodge pickup truck and approached the rear door of the restaurant but discovered that it was locked. Sica then returned to the stolen truck to discuss the next steps with Whitaker, when the pair saw Sergeant Greg Martin of the Jonesville Police Department drive by the location. Sica and Whitaker decided to leave the Huddle House, but Sergeant Martin quickly initiated a traffic stop on the stolen red Dodge pickup truck and called for backup officers. Defendant, realizing that Sica and Whitaker had not returned to the rendezvous point within the planned time period, drove the green Dodge pickup truck toward the main thoroughfare and saw that law enforcement had interrupted Sica and Whitaker. Defendant continued to drive past the scene before doubling back to return to it.

¶ 4 Sergeant Martin asked Sica and Whitaker to exit the red Dodge pickup truck; the men complied. Sergeant Martin asked Sica and Whitaker for permission to search the vehicle; the men consented. Sica and Whitaker stood outside the vehicle while the law enforcement officer began to search a bag that contained the masks that the two men had planned to use in the robbery of the Huddle House. Sica drew a handgun and shot Sergeant Martin in the head six times, killing the law enforcement officer instantly. Sica and Whitaker fled the scene but could not find defendant; as a result, the two men detoured to a nearby business where they abandoned the stolen red Dodge pickup truck and replaced it by stealing a work van belonging to the business. Defendant, upon returning to the scene of the traffic stop, noticed that the red Dodge pickup truck in which Sica and Whitaker had been traveling had left and that four more law enforcement vehicles had arrived. Defendant overheard a police scanner announcement that an officer "was down." Defendant panicked and fled to his cousin's house in Gastonia, where he reunited with Sica and Whitaker later in the day and was informed

of the unexpected events that transpired. The three men traveled to a Home Depot business in the area to abandon the work van which had been taken.

¶ 5 The State's investigation of Sergeant Martin's murder stalled for a number of years. Eventually, investigators were able to discover the identities of the three men and their possible involvement with the murder as part of a failed robbery attempt. Law enforcement officers simultaneously approached defendant, Sica, and Whitaker on 2 October 2012. Defendant and Whitaker each provided full confessions to their roles in the wrongdoing; Sica denied any involvement.

¶ 6 After his arrest, defendant was indicted by a Yadkin County Grand Jury on 28 January 2013 on one count each of first-degree murder, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. Defendant's indictment for attempted robbery with a dangerous weapon alleged that, on 5 October 1996, defendant attempted

> to steal, take and carry away another's personal property, United States currency, from the person and presence of *employees of the Huddle House located at 1538 NC Highway 67, Jonesville, North Carolina*. The defendant committed this act by having in possession and with the use and threatened use of a firearm, a 9mm handgun, whereby the life of the Huddle House employees was threatened and endangered.

(Emphasis added.) Defendant's plea hearing took place on 2 June 2014, where Detective Ron Perry provided, without objection, the factual basis for defendant's charged offenses. Defendant pleaded guilty to one count each of second-degree murder, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. The trial court sentenced defendant to 120 to 153 months in prison.

¶ 7 On 9 June 2015, defendant filed a pro se motion for appropriate relief (MAR) in which he alleged, *inter alia*, that his indictment for attempted robbery with a dangerous weapon was "fatally flawed in that it does not name a victim." The trial court entered an order denying defendant's MAR on 9 March 2017, concluding as a matter of law that "there are no fatal defects in the indictments." Defendant then filed a Supplemental MAR on 16 January 2018, asserting many of the same claims for relief that he asserted in his original MAR. The trial court denied defendant's Supplemental MAR on 16 July 2018, concluding that defendant's claims were both meritless and procedurally barred either by defendant's

failure to raise the issues in his original MAR or by the fact that defendant had already raised the issues in his initial MAR. Defendant then petitioned the Court of Appeals for a Writ of Certiorari which was allowed by the lower appellate court on 28 November 2018 for the limited purpose of reviewing the trial court's conclusion that there were no fatal defects in defendant's indictments. On 19 May 2020, the Court of Appeals issued a divided decision which reversed the trial court's order denying defendant's MAR, with the majority holding that the indictment for robbery with a dangerous weapon "must have named a victim to be valid." *Oldroyd*, 271 N.C. App. at 552. The State filed a notice of appeal to this Court based upon the dissenting opinion filed in the Court of Appeals regarding the outcome of this case, with the dissent registering its disagreement with the majority's conclusion that the indictment at issue here was fatally defective.

II. Analysis

¶ 8 When a criminal defendant challenges the sufficiency of an indictment lodged against him, that challenge presents this Court with a question of law which we review de novo. *State v. White*, 372 N.C. 248, 250 (2019). An indictment need not conform to any "technical rules of pleading," *State v. Sturdivant*, 304 N.C. 293, 311 (1981), but instead must satisfy both the statutory strictures of N.C.G.S. § 15A-924 and the constitutional purposes which indictments are designed to satisfy; namely, to allow the defendant to identify the event or transaction against which he had been called to answer so that he may prepare a defense and to protect the defendant against being twice put in jeopardy for the same crime. *State v. Freeman*, 314 N.C. 432, 435 (1985). Subsection 15A-924(a)(5) is a codification of the common law rule that "an indictment must allege all of the essential elements of the offense charged," *id.*, and is satisfied if an indictment includes "[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation." N.C.G.S. § 15A-924(a)(5) (2021); *see also* N.C.G.S. § 15-153 (2021) ("Every criminal proceeding by warrant, indictment, information, or impeachment is sufficient in form for all intents and purposes if it express the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment."). Therefore, aside from the existence of any additional statutory requirements in specific situations, an indictment is sufficient if it asserts facts plainly,

concisely, and in a non-evidentiary manner which supports each of the elements of the charged crime with the exactitude necessary to allow the defendant to prepare a defense and to protect the defendant from double jeopardy.

¶ 9 Defendant's indictment at issue in the case at bar asserted facts supporting every element of the criminal offense of attempted robbery with a dangerous weapon by providing him with a plain and concise factual statement, without allegations of an evidentiary nature, but with the sufficient precision which is statutorily required to inform defendant of his alleged conduct which resulted in the accusation of his perpetration of the charged offense. A person is guilty of the offense of robbery with a dangerous weapon, or an attempt to commit the crime, if he or she (1) "takes or attempts to take personal property from another," (2) while possessing, using, or threatening to use a firearm or other dangerous weapon, (3) whereby "the life of a person is endangered or threatened." N.C.G.S. § 14-87(a) (1996); *see also State v. Murrell*, 370 N.C. 187, 194 (2017). The indictment in the instant case alleged (1) that defendant did "attempt to steal, take and carry away another's personal property, United States currency, from the person and presence of employees of the Huddle House located at 1538 NC Highway 67, Jonesville, North Carolina," (2) that defendant did so "by having in possession and with the use and threatened use of a firearm, a 9mm handgun," and that, as a result, (3) "the life of the Huddle House employees was threatened and endangered." A comparison of the essential elements of the crime of robbery with a dangerous weapon as set forth in N.C.G.S. § 14-87(a) with the fulsome content of the indictment at issue indicates that the State sufficiently satisfied all of the requirements of N.C.G.S. § 15A-924(a)(5) regarding the properness of the indictment as a criminal pleading. *See State v. Rambert*, 341 N.C. 173, 176 (1995) (holding that the relaxation of strict common law pleading requirements codified in N.C.G.S. § 15A-924 does not require that an indictment "describe in detail the specific events or evidence that would be used to prove each count," so long as the indictment "allege[s] the ultimate facts constituting each element of the criminal offense"). However, while compliance with N.C.G.S. § 15A-924 will generally satisfy the constitutional protections which are guaranteed to criminal defendants by the Double Jeopardy Clause, *Freeman*, 314 N.C. at 435, defendant argues that the indictment here violated his constitutional right to be protected from double jeopardy because the indictment failed to provide the legal name of a person against whom his alleged offense was directed.

¶ 10 Defendant asserts that "an indictment for a crime against the person must state with exactitude the name of a person against whom

the offense was committed, so the indictment protects defendant from double jeopardy[,] . . . gives defendant sufficient notice to prepare a defense[,] and allows the trial court to enter the right judgment if defendant is convicted." Defendant deduces this standard on the basis of several opinions of this Court which he cites and which predate the passage of the Criminal Procedure Act of 1975. In doing so, defendant relies on the application of strict and outdated common law pleading requirements as recounted in *State v. Angel*, 29 N.C. (7 Ired.) 27 (1846). Similarly, defendant construes *State v. Scott*, 237 N.C. 432 (1953), and *State v. Stokes*, 274 N.C. 409 (1968), to support his contention that, notwithstanding the disputed indictment's compliance with the statutory "plain and concise factual statement" standard of N.C.G.S. § 15A-924(a)(5), the indictment here must specifically name each of the alleged targets of his attempted robbery. Defendant's stance, however, does not take into account the relaxation of the erstwhile common law criminal pleadings and the codification of amendments to N.C.G.S. § 15A-924 by the pertinent portion of the Criminal Procedure Act of 1975 which statutorily modernizes the requirements of a valid indictment. *See State v. Williams*, 368 N.C. 620, 623 (2016) ("[W]e are no longer bound by the 'ancient strict pleading requirements of the common law[.]' " (quoting *Freeman*, 314 N.C. at 436)). After all, passage of the Criminal Procedure Act of 1975 signaled a shift "away from the technical rules of pleading" which defendant now asks us to resurrect. *State v. Mostafavi*, 370 N.C. 681, 685 (2018) (extraneity omitted).

¶ 11 Defendant's reliance on this Court's decisions in *Scott* and in *Stokes* is misplaced. In *Scott*, we held that an indictment which alleged that the defendant feloniously assaulted "George Rogers" with the intent to kill "George Sanders" was insufficient because "[a]t *common law* it is of vital importance that the name of the person against whom the offense was directed be stated with exactitude." *Scott*, 237 N.C. at 433 (emphasis added). In *Stokes*, the indictment returned against the defendant failed to allege the identity of the person with whom the defendant allegedly committed a crime against nature. *Stokes*, 274 N.C. at 414. As a result, *Stokes* involved the failure of the indictment to name any victim at all, while *Scott* involved an indictment that gave two different names for the alleged victim. Neither of these types of situations exist in this case. In addition, both of these cases were expressly decided on the basis of the common law rather than the Criminal Procedure Act of 1975 and the codification of much of the Act in N.C.G.S. § 15A-924(a)(5) which had the effect of relaxing the strict common law pleading rules upon which *Scott* and *Stokes* relied.

¶ 12 While defendant argues that his right to be protected from double jeopardy was imperiled by the lack of greater specificity in the description of the alleged victims of his alleged criminal offense, it is worthy of ironic note that it would appear that his protection from being twice put in jeopardy for the commission of the alleged crime is actually reinforced by the identification of a group of persons as the alleged victims here. Such a description of the allegedly wronged individuals would seem to serve to prevent the State from proceeding against defendant in a second prosecution by naming any individual within the "employees of the Huddle House" group as a separate alleged victim, while simultaneously affording defendant additional fortification against further prosecution in the event that any person employed by the establishment on 5 October 1996—whether on duty at the fateful time of day or not—comes forward as an alleged victim.

III. Conclusion

¶ 13 The indictment in the present case, as previously discussed, comports with the requirements of N.C.G.S. § 15A-924(a)(5) and the current status of the law related to the sufficiency of the details which were required to be contained in the indictment in order to provide defendant with a plain and concise factual statement which conveyed the exactitude necessary to place him on notice of the event or transaction against which he was expected to defend, to protect defendant from being placed in jeopardy twice for the same crime, and to guide the trial court in entering the correct judgment. Therefore, the trial court had the necessary jurisdiction to enter judgment against defendant pursuant to his plea of guilty to the charge of attempted robbery with a dangerous weapon. As a result, the Court of Appeals decision is reversed, and the judgment of the trial court is reinstated.

REVERSED.

STATE v. BENNER

[380 N.C. 621, 2022-NCSC-28]

STATE OF NORTH CAROLINA
v.
MATTHEW BENNER

No. 133PA21

Filed 11 March 2022

1. Homicide—first-degree murder—self-defense—jury instructions

In the first-degree murder prosecution for defendant's fatal shooting of an unarmed man in defendant's home, the trial court did not err when it declined to instruct the jury in accordance with North Carolina Pattern Jury Instruction (N.C.P.I.) - Crim. 308.10 where the trial court adequately conveyed the substance of defendant's requested instruction to the jury. The instructions delivered to the jury stated that defendant had no duty to retreat, and the N.C.P.I.'s language concerning defendant's right to "repel force with force regardless of the character of the assault" was not required under the circumstances. Further, defendant failed to establish a reasonable possibility that the outcome would have been different if the trial court had issued defendant's requested jury instructions.

2. Appeal and Error—preservation of issues—jury instructions—specific request

Defendant failed to properly preserve his challenge to the trial court's jury instructions in his trial for first-degree murder—that the trial court allegedly erred by not instructing that defendant was presumed to have had a reasonable fear of imminent death or great bodily injury—where defendant did not specifically request the instruction but rather simply requested that the trial court instruct the jury in accordance with N.C.P.I. - Crim. 308.10.

Justice HUDSON dissenting.

Justice EARLS joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 276 N.C. App. 275 (2021), affirming judgments entered on 22 October 2018 by Judge Kevin M. Bridges in Superior Court, Davidson County. Heard in the Supreme Court on 8 November 2021.

Joshua H. Stein, Attorney General, by Joseph L. Hyde, Assistant Attorney General, for the State-appellee.

M. Gordon Widenhouse, Jr., for defendant-appellant.

ERVIN, Justice.

¶ 1 The issue before the Court in this case is whether the trial court completely and accurately instructed the jury concerning the extent to which defendant was entitled to exercise the right of self-defense at his trial for first-degree murder. In seeking relief before this Court, defendant contends that the trial court erred by (1) rejecting his request that the jury be instructed in accordance with N.C.P.I. – Crim. 308.10 and (2) failing to instruct the jury that defendant was "presumed to have held a reasonable fear of imminent death or serious bodily harm to himself" in light of the fact that defendant had been attacked in his own home. After careful consideration of defendant's challenges to the trial court's judgments in light of the applicable law, we affirm the decision of the Court of Appeals.

I. Factual Background

A. Substantive Facts

¶ 2 In January 2017, Samantha Wofford lived in a single-wide mobile home in Davidson County with her mother and fiancé, Russell Gwyn. Defendant resided in an adjacent mobile home, which featured a small deck from which a flight of steps led from the front door to the yard. On the evening of 6 January 2017, when it was snowing, Ms. Wofford and Mr. Gwyn were walking their two dogs when Ms. Wofford noticed an unfamiliar car parked outside defendant's mobile home. At approximately 10:00 p.m., Ms. Wofford reentered her residence with one of the dogs while Mr. Gwyn remained outside with the other.

¶ 3 As Mr. Gwyn walked from the back yard around the side of his residence, he heard loud bickering coming from defendant's mobile home and decided that it was time for him to go back inside. As he walked toward the front steps of his residence, Mr. Gwyn heard a gunshot, at which point he turned and saw a man fall backward from the bottom of the steps leading to defendant's mobile home before hitting the ground. At that point, Mr. Gwyn reentered his own mobile home and told Ms. Wofford to "[c]all 911. Somebody's been shot." After opening the front door and seeing a man lying in the front yard while defendant, who was holding a firearm, looked on, Ms. Wofford returned to her residence and called for emergency assistance.

¶ 4 At the time that Deputy Sheriffs Benjamin Schlemmer and Matthew Higgins of the Davidson County Sheriff's Office arrived at the scene, they observed a white male, who was later determined to be Damon Dry, lying on his back at the bottom of the flight of steps leading to defendant's mobile home. As they cautiously approached defendant's residence, Deputy Higgins struck the side of the structure with his flashlight and ordered any occupants to come outside. As he did so, Deputy Higgins heard loud noises emanating from the interior of the mobile home and noted that the steps leading into that structure were covered with blood and snow.

¶ 5 After Deputy Higgins had ordered the occupants of the mobile home to come outside approximately five times, defendant emerged from the front door with his hands in the air and walked down the steps. At that point, Deputy Higgins handcuffed defendant, walked defendant to his patrol vehicle, and secured defendant in the rear seat. As he did so, Deputy Higgins smelled the odor of alcohol on defendant's breath and observed that defendant had blood on his face, arms, and hands and had blood stains on the sweatpants that he was wearing.

¶ 6 Once defendant had been placed in Deputy Higgins' patrol vehicle, Deputies Schlemmer and Higgins conducted a security sweep of defendant's residence. In the course of determining that defendant's mobile home was unoccupied, the deputies discovered the presence of blood on the front door frame and the screen door. After surveying defendant's residence, Deputy Schlemmer began a crime scene log and secured the premises with security tape, while Deputy Higgins checked on Mr. Dry, who was not breathing, had fixed eyes, and was surrounded with blood and wearing a t-shirt that appeared to be stippled with shotgun pellets. A subsequent autopsy confirmed that Mr. Dry had died from gunshot wounds to the chest.

¶ 7 As the deputies took turns sitting in Deputy Higgins' patrol vehicle with defendant for the purpose of keeping warm, defendant began behaving in an erratic manner, becoming angry and kicking the patrol vehicle's window. In an effort to stop defendant from engaging in this sort of conduct, Deputy Schlemmer, with the assistance of Sergeant Christopher Stilwell, the supervisor of the patrol unit to which Deputies Schlemmer and Higgins belonged, opened the door of the compartment in which defendant was seated. As he did so, defendant said "You know I shot him. Take me to jail. Take these cuffs off me. Put them up front."

¶ 8 At a later time, investigating officers removed defendant from the patrol vehicle while Deputy Matthew Riddle of the Davidson County

Sheriff's Office swabbed defendant's hands for the purpose of determining whether gunshot residue was present. Although defendant was calm and compliant when this process began, he soon became agitated and belligerent, stating that he did not "know why we're doing this" since "I shot the m- - - - f - - - -." After swabbing defendant's hands, Deputy Riddle completed the necessary information sheet and secured the swabbings in his vehicle while defendant continued to scream and yell, "I shot the m- - - - - f- - - - -."

¶ 9 Once they had obtained the issuance of a search warrant authorizing them to enter the residence, investigating officers examined the interior of defendant's mobile home more thoroughly and observed the presence of blood on the steps, the railing, the ground in front of the steps, the screen door, and a stack of newspapers located just inside the front door. In addition, the investigating officers located a silver .38 caliber revolver that contained two spent shells and four live rounds in the kitchen sink, a second revolver in the master bedroom, and a third handgun and six long guns in a gun safe that was situated in the closet of a workout room at the far end of the mobile home.

¶ 10 At trial, defendant testified that he and his friend, William Tuller, had met Mr. Dry several years earlier and that they had discovered that all three of them shared a mutual interest in firearms. As a result, defendant had visited in Mr. Dry's home on several occasions for the purpose of examining Mr. Dry's rifle collection and had shown Mr. Dry how to properly load and shoot these weapons. Eventually, however, defendant lost contact with Mr. Tuller and claimed that he had not been in the physical presence of either Mr. Tuller or Mr. Dry for approximately five years prior to 6 January 2017, although he admitted that he had spoken with Mr. Dry, who had called to inquire if defendant's employer was hiring additional workers, approximately a year and half prior to the date of the shooting.

¶ 11 Defendant testified that he had left work just before noon on 6 January 2017, had completed several errands, and had purchased a bottle of vodka before returning home. After spreading newspapers on the floor adjacent to his front door to prevent the introduction of snow into his residence and sweeping off his front deck, defendant entered the kitchen and poured himself a drink. At approximately 8:00 p.m., defendant answered a knock on his front door and discovered that Mr. Dry had arrived. Although defendant claimed to have been surprised by Mr. Dry's visit given the lengthy period of time that had elapsed since they had last seen each other, defendant invited Mr. Dry to come in for a drink. According to defendant, Mr. Dry claimed that he had recently

lost his job and wanted to know whether defendant's employer had any openings. After defendant told Mr. Dry that his employer did not have any vacant positions at that time, the two men continued to converse and walked around defendant's mobile home, during which time defendant pointed out the workbench at which he built items for his home and reloaded ammunition for his firearms.

¶ 12 At approximately 9:30 p.m., after the two men had had a second drink, defendant "started dropping hints" that Mr. Dry should leave in light of the fact that defendant had not showered since getting off work. Although Mr. Dry repeated his earlier question about the possibility that he might find work with defendant's employer, defendant reiterated that there were no open positions at his place of work. Shortly before 10:00 p.m., defendant took Mr. Dry's cup, placed it in the kitchen sink, and told Mr. Dry that "[i]t's time to leave," at which point Mr. Dry "got kind of a wild eyed look on his face"; said "[m]an, I really need a job. I need a job. I need money"; and grabbed defendant's shirt before pushing defendant back against the sink. In response, defendant shoved Mr. Dry, opened the front door, and ordered Mr. Dry to leave. As Mr. Dry rushed at defendant and pushed defendant against the door jamb, he said, "I'm not leaving" and "I need money."

¶ 13 At some point during this altercation, defendant escaped to his bedroom, where he retrieved a revolver from his nightstand before returning to the living room, pointing the gun at Mr. Dry, and threatening to shoot Mr. Dry if he did not leave. After defendant made these comments, Mr. Dry stated that he was going to kill defendant and started moving toward him. As Mr. Dry was about to reach him, defendant fired two shots into Mr. Dry's chest, causing Mr. Dry to stand up and walk out the front door.

¶ 14 Upon making his way to the front door, defendant saw Mr. Dry, who appeared to be dead, lying on the ground outside. Although defendant went down the steps for the purpose of checking on Mr. Dry, he was unable to detect a pulse upon examining Mr. Dry's body. At that point, defendant washed his hands in the sink and called his mother, who told him to seek emergency assistance and to wait for law enforcement officers and other emergency personnel to arrive. In spite of the fact that defendant did not recall having heard anyone knocking on the exterior of his mobile home, he stepped outside and surrendered when he observed shadows moving around in the yard.

B. Procedural History

¶ 15 On 13 March 2017, the Davidson County grand jury returned bills of indictment charging defendant with first-degree murder and possession

of a firearm by a felon. The charges against defendant came on for trial before the trial court and a jury at the 10 October 2018 session of Superior Court, Davidson County. At trial, the State elicited evidence tending to show that defendant had been previously convicted of breaking or entering a motor vehicle in Guilford County. Although defendant did not deny the existence of this previous felony conviction or that he had kept firearms in his residence, he claimed to have been unaware that it was unlawful for him to possess a firearm given his belief that he "had all [his] rights restored to [him] over 20 years ago, including the right to keep and bear arms."

¶ 16 At the jury instruction conference, the trial court proposed, with the concurrence of the prosecutor, to instruct the jury in accordance with N.C.P.I. – Crim. 206.10, which encompasses the law of first-degree murder involving the use of a deadly weapon and the effect of a defendant's claim to have exercised the right of self-defense. N.C.P.I. – Crim. 206.10. Although defendant requested the trial court to instruct the jury in accordance with N.C.P.I. – Crim. 308.10, which informs the jury that a defendant who is situated in his own home and is not the initial aggressor can "stand the defendant's ground and repel force with force regardless of the character of the assault being made upon the defendant," the State objected to defendant's request on the grounds that, while N.C.P.I. – Crim. 308.10 reflected the provisions of N.C.G.S. §§ 14-51.2 and 14-51.3, which provide for a statutory right of self-defense, the justification described in those provisions is not available to a person who "[w]as attempting to commit, committing, or escaping after the commission of a felony." N.C.G.S. § 14-51.4(1). According to the State, since "defendant was in the commission of and was continually committing the felony of possession of a firearm by a felon," the "plain language" of N.C.G.S. § 14-51.4(1) deprived him of his statutory right of self-defense. After arguing that the limitation upon the right of self-defense upon which the State relied should not apply given the absence of any "causal connection" between defendant's possession of a firearm and his need to use that firearm in self-defense, defendant acknowledged that the Court of Appeals had rejected a similar argument in *State v. Crump*, 259 N.C. App. 144, 150 (2018), *overruled by State v. McLymore*, 2022-NCSC-12, while contending that the relevant portion of *Crump* was dicta and that adhering to the interpretation adopted in *Crump* would create the "absurd result" that a defendant attacked in his own home would be prohibited from defending himself based solely upon his status as a convicted felon.[1] At the conclusion of the jury instruction conference, the trial

1. After the conclusion of defendant's trial, this Court reversed the Court of Appeals' decision in *Crump* on other grounds without reaching the self-defense issue that was

court declined to instruct the jury in accordance with N.C.P.I. – Crim. 308.10 on the grounds that a contrary action would require it to ignore the plain language of N.C.G.S. § 14-51.4.

¶ 17 On 19 October 2018, the jury returned a verdict finding defendant guilty of possession of a firearm by a felon. On 22 October 2018, the jury returned a verdict convicting defendant of first-degree murder. After accepting the jury's verdicts, the trial court entered judgments sentencing defendant to a term of life imprisonment without the possibility of parole based upon his conviction for first-degree murder and to a concurrent term of fourteen to twenty-six months imprisonment based upon his conviction for possession of a firearm by a felon. Defendant noted an appeal to the Court of Appeals from the trial court's judgments.

C. Court of Appeals Decision

¶ 18 In seeking relief from the trial court's judgments before the Court of Appeals, defendant argued that the trial court had (1) erred by rejecting his request that the jury be instructed in accordance with N.C.P.I. – Crim. 308.10 and that the jury should presume that he had a reasonable fear of death or great bodily injury in light of the fact that he had been attacked in his own home; (2) committed plain error by failing to instruct the jury concerning defendant's "mistake of fact" in believing that his right to possess a firearm had been restored; and (3) erred by requiring defendant to pay restitution in the amount of $1,874.49 in light of the fact that the record developed at the sentencing hearing did not support that award.[2] In support of the first of these three contentions, defendant argued that he was entitled to a "proper, complete instruction on self-defense, including the right to 'stand his ground' in his own home and have the jury presume his fear of death was reasonable," and asserted, without making any reference to *Crump*, that a literal reading of N.C.G.S. § 14-51.4(1) that had the effect of precluding him from taking advantage of the right of self-defense made available by N.C.G.S.

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before us in that case. *See State v. Crump*, 376 N.C. 375 (2020). Subsequently, however, we held in *McLymore* that, in order for a defendant to be precluded from exercising the right of self-defense on the basis of the felony disqualifier set out in N.C.G.S. § 14-51.4(1), "the State must prove the existence of an immediate causal nexus between the defendant's disqualifying conduct and the confrontation during which the defendant used force," effectively overruling the aspect of the Court of Appeals' decision in *Crump* upon which the trial court relied in this case. *McLymore*, ¶¶ 14, 30.

2. In view of the fact that the second and third of the three challenges that defendant advanced in opposition to the trial court's judgments before the Court of Appeals have not been brought forward for our consideration, we will refrain from discussing them any further in this opinion.

§§ 14-51.2 and 14-51.3 for the sole reason that he was, as a convicted felon, prohibited from possessing a firearm would produce "absurd results."

¶ 19 In rejecting defendant's initial challenge to the trial court's judgments, the Court of Appeals concluded that, to the extent that defendant was seeking relief on the basis of the trial court's failure to instruct the jury that he was "presumed to have held a reasonable fear of imminent death or serious bodily harm to himself" at the time that he had been attacked by Mr. Dry, defendant had failed to preserve this issue for purposes of appellate review given that he had not requested the trial court to instruct the jury in accordance with N.C.P.I. – Crim. 308.80 (June 2021), which addresses a defendant's right to defend his or her home. *State v. Benner*, 276 N.C. App. 275, 2021-NCCOA-79, ¶ 21 (unpublished). In upholding the trial court's refusal to instruct the jury in accordance with N.C.P.I. – Crim. 308.10, the Court of Appeals determined that it was bound by its prior decision in *Crump*, which held that the disqualification provision set out in N.C.G.S. § 14-51.4(1) did not require the existence of a "causal nexus" between the disqualifying felony and the circumstances giving rise to the defendant's perceived need to use defensive force. *Id.*, ¶ 27 (citing *In re Civil Penalty*, 324 N.C. 373, 384 (1989)). As a result, the Court of Appeals found no error in defendant's first-degree murder conviction. *Id.*, ¶ 39. On 9 June 2021, this Court allowed defendant's petition for discretionary review of the Court of Appeals' decision.

II. Substantive Legal Analysis

A. Standard of Review

¶ 20 This Court reviews decisions of the Court of Appeals for errors of law. N.C. R. App. P. 16(a); *State v. Melton*, 371 N.C. 750, 756 (2018). "In determining the propriety of the trial judge's charge to the jury, the reviewing court must consider the instructions in their entirety, and not in detached fragments." *State v. Holden*, 346 N.C. 404, 438–39 (1997) (cleaned up). The trial court is required to give a requested instruction "only if the proposed charge is a correct statement of the law and is supported by the evidence." *State v. Bell*, 338 N.C. 363, 391 (1994) (citation omitted). In evaluating the extent to which a trial court did or did not err in refusing to instruct the jury in accordance with a defendant's request, we interpret the facts in the light most favorable to the defendant. *State v. McCray*, 312 N.C. 519, 529 (1985) (citation omitted). A trial court's erroneous refusal to instruct the jury in accordance with a criminal defendant's request will not result in a reversal of the trial court's judgment unless the error in question has prejudiced the defendant, with such prejudice having occurred in the event that the

defendant shows that there is a "reasonable possibility that, had the trial court given the [required instruction], a different result would have been reached at trial." *State v. Lee*, 370 N.C. 671, 672 (2018); *see also* N.C.G.S. §§ 15A-1442(4)(d), 1443(a) (2021).

B. Duty to Retreat Instruction

¶ 21 **[1]** In seeking to persuade us to overturn the Court of Appeals' decision, defendant begins by arguing that, in rejecting his request that the trial court instruct the jury in accordance with N.C.P.I. – Crim. 308.10, the trial court had deprived him of the right to a "complete self-defense instruction," so that he was entitled to a new trial. *State v. Bass*, 371 N.C. 535, 542 (2018); *State v. Coley*, 375 N.C. 156, 159, 164 (2020). According to N.C.P.I. – Crim. 308.10:

> If the defendant was not the aggressor and the defendant was [in the defendant's own home] [on the defendant's own premises] [in the defendant's place of residence] [at the defendant's workplace] [in the defendant's motor vehicle] [at a place the defendant had a lawful right to be], the defendant could stand the defendant's ground and repel force with force regardless of the character of the assault being made upon the defendant. However, the defendant would not be excused if the defendant used excessive force.

N.C.P.I. – Crim. 308.10 (footnotes omitted). N.C.P.I. – Crim. 308.10 is derived in part from N.C.G.S. §§ 14-51.2 and 14-51.3, which, by statute, authorize the exercise of the right to self-defense under certain circumstances. *See Bass*, 371 N.C. at 540–41. According to N.C.G.S. § 14-51.2(b), "[t]he lawful occupant of a home . . . is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm" in the event that the person against whom the defendant was using defensive force was attempting to "unlawfully and forcefully" enter the defendant's home, while N.C.G.S. § 14-51.2(f) provides that "[a] lawful occupant within his or her home . . . does not have a duty to retreat from an intruder in the circumstances described in this section" and N.C.G.S. § 51.2(g) clarifies that "[t]his section is not intended to repeal or limit any other defense that may exist under the common law."

¶ 22 According to defendant, N.C.P.I – Crim. 308.10, "particularly the language that a person in his home could 'repel force with force regardless of the character of the assault being made upon' him, describe[s] his

common law right to use force, even deadly force, when defending himself in his own home."[3] According to defendant, the trial court and the Court of Appeals both erred in relying upon the disqualification provision set out in N.C.G.S. § 14-51.4(1) to justify the rejection of his request that the jury be instructed in accordance with N.C.P.I. – Crim. 308.10 by ignoring the fact that N.C.G.S. § 14-51.2(g) precludes the use of N.C.G.S. § 14-51.4(1) "to repeal or limit" common law defenses. As a result, defendant contends that the trial court's instructions to the jury were incomplete given that "a defendant entitled to *any* self-defense instruction is entitled to a *complete* self-defense instruction, which includes the relevant stand-your-ground provision," *Bass*, 371 N.C. at 542 (emphasis in original), and that a complete self-defense instruction would have informed the jury that defendant was entitled to "repel force with force regardless of the character of the assault being made upon [him]," N.C.P.I. – Crim. 308.10.

¶ 23 In defendant's view, he was clearly prejudiced by the trial court's erroneous refusal to instruct the jury in accordance with N.C.P.I. – Crim. 308.10 on the grounds that the record contained ample evidence tending to show that Mr. Dry had attacked him in his own home. Defendant contends that, "[u]nder the facts, taken in the light most favorable to him, [defendant] was entitled to have the jury properly instructed on his common law and statutory right to use deadly force to defend himself in his home" "regardless of the character of the assault" given that the delivery of such an instruction would have "inform[ed] the [jury's] determination of whether [defendant's] actions were reasonable under the circumstances, which is a critical component of self-defense." *See Lee*, 370 N.C. at 673–75. After acknowledging that the jury knew that defendant had shot Mr. Dry when Mr. Dry was unarmed and that the jury had been told that defendant would not be entitled to have acted in self-defense in the event that he had used excessive force, defendant points out that "the jury was never told that he could use deadly force to repel non-deadly force in his own home." As a result, defendant contends that "the [S]tate cannot show this constitutional error was harmless beyond a reasonable doubt."

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3. According to the State, this aspect of defendant's challenge to the Court of Appeals' decision is not properly before us given that, "[b]eyond quoting N.C.P.I. – Crim. 308.10, [d]efendant made no argument to the Court of Appeals that he was not entitled to an instruction that he could repel force with force in his own home 'regardless of the character of the assault' " and given that "[q]uestions not presented to the Court of Appeals are not properly before [the Supreme Court]." *See State v. Hurst*, 304 N.C. 709, 713 (1982) (per curium). A careful review of the record persuades us, however, that defendant has argued at every stage of this case that the trial court erred by refusing to instruct the jury in accordance with N.C.P.I. – Crim. 308.10.

¶ 24 In seeking to persuade us to uphold the Court of Appeals' decision with respect to this issue, the State begins by arguing that the trial court did not err in instructing the jury in accordance with N.C.P.I. – Crim. 308.10 on the grounds that, even if defendant was entitled to the delivery of an instruction like that set out in N.C.P.I. – Crim. 308.10, "the trial court adequately convey[ed] the substance of [defendant's] request" to the jury, citing *State v. Godwin*, 369 N.C. 604, 613 (2017) (holding that, "[w]hen a defendant requests a special jury instruction that is correct in law and supported by the evidence, the court must give the instruction in substance" but that "the court is not required to give [the instruction] verbatim"), and *State v. Trull*, 349 N.C. 428, 455–56 (1998) (noting that "jury instructions should be as clear as practicable, without needless repetition"). After pointing out that the trial court had informed the jury that defendant would not be guilty of first-degree murder in the event that he acted in self-defense and that he had no duty to retreat in his own home, the State contends that, "[w]hen the use of defensive force is authorized, there is no meaningful difference between a stand-your-ground instruction and a no-duty-to-retreat instruction." According to the State, the reference to "regardless of the character of the assault" contained in N.C.P.I. – Crim. 308.10 "is intended to erase the distinction between simple and felonious assaults, vis-à-vis the duty to retreat, when a person is attacked in his home" and that, because the trial court in this case did not tell the jury that defendant had a duty to retreat from a simple assault, there was no need to qualify that instruction with respect to defendant's right to self-defense in his own home. Finally, the State contends that, because the trial court instructed the jury that defendant could use deadly force in self-defense and that he had no duty to retreat in his own home, defendant "fails to explain how the omitted instruction would have added any substantive principle on which he could have been acquitted," so that defendant had failed to show that there was a "reasonable possibility" that the jury would have reached a different outcome had defendant's requested instruction been delivered.

¶ 25 The initial issue that we are required to address in evaluating the validity of defendant's challenge to the Court of Appeals' decision is whether defendant's proposed instruction rested upon a correct statement of the applicable law. *Bell*, 338 N.C. at 391. At the outset, we acknowledge that differences exist between the language in which N.C.P.I – Crim. 308.10 and N.C.G.S. §§ 14-51.2 and 14-51.3 are couched. Although N.C.P.I. – Crim. 308.10 cites N.C.G.S. §§ 14-51.2(f) and 14-51.3(a), the language used in this instruction antedates the enactment of these statutory provisions. In *State v. Morgan*, we quoted the 1983 edition of N.C.P.I. – Crim. 308.10, which provided that:

> If the defendant was not the aggressor and he was [in his own home] [on his own premises] [at his place of business] he could stand his ground and repel force with force regardless of the character of the assault being made upon him. However, the defendant would not be excused if he used excessive force.

315 N.C. 626, 643 (1986). The only difference between the 1983 and 2019 versions of N.C.P.I. – Crim. 308.10 is the addition of "the defendant's motor vehicle" and "a place the defendant had a lawful right to be" to the list of places in which a defendant was entitled to stand his or her ground, additions that clearly reflect the enactment of N.C.G.S. §§ 14-51.2(b) and 14-51.3(a). The 1983 instruction quoted in *Morgan*, in turn, appears to have been derived from our decision in *State v. Johnson*, which declares that,

> [o]rdinarily, when a person who is free from fault in bringing on a difficulty, is attacked in his own home or on his own premises, the law imposes on him no duty to retreat before he can justify his fighting in self defense, *regardless of the character of the assault*, but is entitled to stand his ground, *to repel force with force*, and to increase his force, so as not only to resist, but also to overcome the assault and secure himself from all harm. This, of course, *would not excuse the defendant if he used excessive force* in repelling the attack and overcoming his adversary.

261 N.C. 727, 729–30 (1964) (per curium) (citations omitted) (emphasis added). Thus, defendant's contention that the portion of N.C.P.I. – Crim. 308.10 allowing him to "repel force with force regardless of the character of the assault being made upon [him]" appears rooted in common, rather than statutory, law. As a result, the remaining issue that we must address is whether defendant was entitled to the delivery of the requested instruction in light of the facts of this case.

¶ 26 Despite the fact that, while the enactment of N.C.G.S. § 14-51.2 was not "intended to repeal or limit any other defense that may exist under the common law," N.C.G.S. § 14-51.2(g), we have held that the enactment of N.C.G.S. § 14-51.3 has supplanted the common law right to perfect self-defense to the extent that it addresses a particular issue, a fact that renders the disqualification provision set out in N.C.G.S. § 14-51.4 potentially relevant to this case, assuming that the factual predicate necessary for the invocation of this disqualification exists. *See McLymore*,

¶ 12. According to the trial court and the Court of Appeals, the fact that defendant fatally wounded Mr. Dry while possessing a firearm after having been convicted of a felony compelled the conclusion that the justifications afforded by N.C.G.S. §§ 14-51.2 and 14-51.3 as reflected in N.C.P.I. – Crim. 308.10 were not available to him. Although this conclusion may be inconsistent with N.C.G.S. § 14-51.2(g), which upholds the continued validity of the common law with respect to the exercise of one's right to defend one's habitation, as well as our decision in *McLymore*, we need not reconcile any such inconsistency or address the manner in which the disqualification provision contained in N.C.G.S. § 14-51.4(1) should be applied in this case given that, as the State has argued, the trial court included the substance of the instruction upon which defendant's challenge to the Court of Appeals' decision rests in the remainder of its instructions to the jury.[4]

¶ 27 Even if a litigant is otherwise entitled to the delivery of a particular instruction, "the court is not required to give [it] verbatim"; instead, "it is sufficient if [the instruction is] given in substance." *Godwin*, 369 N.C. at 613. In other words, "[i]f the instructions given by the trial court adequately convey the substance of defendant's proper request, no further instructions are necessary," *id.* (cleaned up), with this being true even if the trial court relied upon an impermissible reason for refusing to deliver the requested instruction. At trial, the trial court instructed the jury in accordance with N.C.P.I – Crim. 206.10 that:

> The defendant would be excused of first degree murder and second degree murder on the grounds of self defense if, first, the defendant believed it was necessary to kill the alleged victim in order to save the defendant from death or great bodily harm and,

4. Aside from the arguments addressed in the text of this opinion, the State contends that the trial court did not err by denying defendant's request that the jury be instructed in accordance with N.C.P.I. – Crim. 308.10 on the theory that defendant's requested instruction lacked sufficient evidentiary support. In the State's view, defendant "did not stand his ground when [Mr.] Dry attacked him in the kitchen" and, instead, "withdrew to the bedroom to retrieve a firearm." Aside from the fact that the evidence, when viewed in the light most favorable to defendant, would support an inference that Mr. Dry advanced upon defendant at a time when he was in his own residence and after defendant had retrieved a firearm, defendant is not required to have a weapon in his possession at all times in order to avoid the necessity of retreating when called upon to defend himself or herself in his or her own home. *Cf. State v. Miller*, 267 N.C. 409, 411 (1966) (stating that, when a homeowner fears that an intruder may attempt to inflict serious injury upon him or his family, "the law does not require such householder to flee or to remain in his house until assailant is upon him, but he may open his door and shoot his assailant, if such course is apparently necessary for the protection of himself or family") (cleaned up).

> second, the circumstances as they appeared to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness.
>
> In determining the reasonableness of defendant's belief, you should consider the circumstances as you find them to have existed from the evidence, including the size, age and strength of the defendant as compared to the alleged victim, the fierceness of the assault, if any, upon the defendant, and whether the alleged victim had a weapon in the alleged victim's possession.
>
> The defendant would not be guilty of any murder or manslaughter if the defendant acted in self defense and if the defendant did not use excessive force under the circumstances.
>
> A defendant does not have the right to use excessive force. A defendant uses excessive force if a defendant uses more force than reasonably appeared to the defendant to be necessary at the time of the killing. It is for you, the jury, to determine the reasonableness of the force used by the defendant under all of the circumstances as they appeared to the defendant at the time.
>
> Furthermore, the defendant has no duty to retreat in a place where the defendant has a lawful right to be. The defendant would have a lawful right to be in the defendant's home. Therefore, in order for you to find the defendant guilty of first degree murder or second degree murder, the State must prove beyond a reasonable doubt, among other things, that the defendant did not act in self defense.

Thus, the trial court clearly informed the jury that defendant had no duty to retreat before exercising the right to defend himself in his own home, with there being no material difference that we can see between an instruction that "defendant could stand the defendant's ground" and an instruction that defendant "has no duty to retreat." *See McCray*, 312 N.C. at 532. In addition, the trial court instructed the jury that defendant was entitled to exercise the right of self-defense in the event that he "believed it was necessary to kill [Mr. Dry] . . . to save [himself] from death or great bodily harm" and that his belief to that effect was reasonable

in light of "the circumstances as they appeared to the defendant at the time," with this instruction being materially the same as an instruction that defendant had the right to "repel [deadly] force with [deadly] force." *See* N.C.P.I – Crim. 308.10. As a result, given that the instructions that the trial court delivered to the jury included the substance of defendant's requested instruction, the trial court did not err by failing to instruct the jury using the exact language in which N.C.P.I. – Crim. 308.10 is couched. *See Godwin*, 369 N.C. at 613.

¶ 28 In defendant's view, however, the instructions that the trial court actually delivered did not suffice to obviate the necessity for overturning defendant's first-degree murder conviction because those instructions did not include any language concerning defendant's right to "repel force with force regardless of the character of the assault." In support of this argument, defendant directs our attention to *State v. Francis*, in which we held that the trial court erred by instructing the jury that "a person can't fight somebody with a pistol who is making what is called a simple assault on him, that is an assault in which no weapon is being used, such as a deadly weapon or a knife or a pistol," on the grounds that, "[o]rdinarily, when a person, who is free from fault in bringing on a difficulty, is attacked in his own dwelling, or home . . . , the law imposes upon him no duty to retreat before he can justify his fighting in self-defense, —*regardless of the character of the assault*." 252 N.C. 57, 58–59 (1960) (emphasis added) (quoting *State v. Pennell*, 231 N.C. 651, 654 (1950)). We also noted in *Francis* that, in the event that a defendant was in his own home and was acting in defense of himself or his habitation, he "was not required to retreat in the face of a threatened assault, *regardless of its character*, but was entitled to stand his ground, to repel force with force, and to increase his force, so as not only to resist, but also to overcome the assault." *Id.* at 59–60 (emphasis added) (internal citations omitted). In our opinion, defendant's reliance upon *Francis* is misplaced.

¶ 29 The essential defect that led us to grant the defendant a new trial in *Francis* was that the trial court's erroneous instruction "virtually eliminate[d] the defendant's right of self-defense since he used a pistol in connection with defending himself against a *simple assault*." *Id.* at 59 (emphasis added). Although we did use the expression "regardless of the character of the assault" in discussing the defendant's right to defend himself, the State is correct that our use of that language was intended to make it clear that there was no distinction between a simple and a felonious assault in determining whether a defendant had a duty to retreat before exercising the right of self-defense in his own home. On the

other hand, *Francis* reiterates the well-established legal principle that, even though a defendant attacked in his own home is " 'entitled to stand his ground, to repel force with force, and to increase his force, so as not only to resist, but also to overcome the assault,' " such an entitlement " 'would not excuse the defendant if he used excessive force in repelling the assault,' " *Francis*, 252 N.C. at 758 (quoting *State v. Sally*, 233 N.C. 225, 226 (1951) (citations omitted)), a statement that indicates that the proportionality rule inherent in the requirement that the defendant not use excessive force continues to exist even in instances in which a defendant is entitled to stand his or her ground. For that reason, a trial court need not use the expression "regardless of the character of the assault" in the absence of a concern that the jury would believe that the nature of the assault that the victim had made upon the defendant had some bearing upon the extent to which a defendant attacked in his own home has a duty to retreat before exercising the right of self-defense. *See also State v. Pearson*, 288 N.C. 34, 39–40 (1975); *State v. Frizzelle*, 243 N.C. 49, 50–51 (1955). In view of the fact that the trial court in this case made no distinction between a simple and a felonious assault in its instructions to the jury concerning the extent to which defendant was entitled to exercise the right of self-defense without making an effort to retreat and did not tell the jury that defendant was not entitled to use a firearm or any other form of deadly force in the course of defending himself from Mr. Dry's attack as long as he actually and reasonably believed that he needed to use deadly force to protect himself from death or great bodily injury, the trial court did not need to further clarify that defendant was entitled to exercise the right of self-defense "regardless of the character of the assault." *See Holden*, 346 N.C. at 439 (stating that "the reviewing court must consider [jury] instructions in their entirety, and not in detached fragments") (cleaned up).

¶ 30 Finally, we conclude that, even if the trial court erred by rejecting defendant's request that the jury be instructed in accordance with N.C.P.I. – Crim. 308.10, defendant has failed to establish that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a)–(b);[5] *see also Lee*, 370 N.C. at 671 (concluding that the

5. Although defendant asserts that the trial court's alleged error was of a constitutional dimension, defendant did not object to the trial court's instructions on constitutional grounds prior to the beginning of the jury's deliberations and has failed to explain how the trial court's instructions violated any of his constitutional rights. As a result, the prejudicial effect of any instructional error that the trial court might have committed should be evaluated on the basis of the test set out in N.C.G.S § 15A-1443(a) rather than on the basis of the prejudice test applicable to constitutional errors set out in N.C.G.S. § 15A-1443(b).

defendant had "shown a reasonable possibility" that a different result would have been reached at trial had the trial court given the requested stand-your-ground instruction). As we have already noted, the trial court instructed the jury in such a manner as to effectively inform it that defendant had the right to stand his ground in the event that he was attacked within his own residence and did not distinguish between attacks made upon him using deadly, as compared to non-deadly, force in those instructions. As we have already noted, in this case, unlike in *Lee*, the jury *was* told that defendant had no duty to retreat after having been attacked in his own home. Finally, the record contains more than sufficient evidence from which a reasonable jury could have determined that defendant used excessive force when he killed Mr. Dry. Thus, for all of these reasons, we hold that the trial court did not err by declining to instruct the jury in accordance with N.C.P.I. – Crim. 308.10 and that there is no reasonable possibility that the outcome would have been different had the trial court instructed the jury consistently with defendant's request. As a result, defendant is not entitled to any relief from the Court of Appeals' decision based upon the first of the two challenges that he has advanced in opposition to that decision before this Court.

C. Presumption of Reasonable Fear Instruction

¶ 31 **[2]** In the second of the two challenges to the Court of Appeals' decision that defendant has advanced before this Court, defendant contends that the Court of Appeals erroneously upheld the trial court's failure to afford him the benefit of a "complete self-defense instruction" by refusing to instruct the jury that he was "presumed to have held a reasonable fear of imminent death or serious bodily harm to himself" in light of the fact that he had been attacked in his own home. In defendant's view, he was entitled to the delivery of this instruction notwithstanding the trial court's invocation of the disqualifier contained in N.C.G.S. § 14-51.4(1). As the Court of Appeals correctly held, however, defendant failed to properly preserve his challenge to the trial court's alleged instructional error for purposes of appellate review.

¶ 32 "A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict . . . ." N.C. R. App. P. 10(a)(2). According to well-established North Carolina law, a party's decision to request the delivery of a particular instruction during the jury instruction conference suffices to preserve a challenge to the trial court's refusal to deliver that instruction to the jury for further consideration by the appellate courts regardless of the extent to which the relevant party does or does not lodge a subsequent objection.

State v. Hood, 332 N.C. 611, 616–17 (1992). *But see State v. Gay*, 334 N.C. 467, 486 (1993) (observing that "defendant has waived her right to review of this issue by failing to object to the trial court's omission of the requested instruction"). In addition, in the event that "the judicial action questioned is specifically and distinctly contended to amount to plain error," the extent to which the judicial action or inaction constitutes plain error may be argued before a reviewing court. N.C. R. App. P. 10(a)(4). On the other hand, if a party neither lodges a timely objection nor asserts that the trial court's action or inaction constituted plain error, all review of that alleged error, including plain error, has been waived. *State v. Bell*, 359 N.C. 1, 27 (2004).

¶ 33 In seeking to persuade us that the Court of Appeals erred by holding that he had failed to preserve for appellate review his challenge to the trial court's failure to instruct the jury that defendant had a reasonable fear that he was at imminent risk of death or great bodily harm in view of the fact that he had been assaulted in his own home, defendant states that, during the jury instruction conference, counsel for both parties discussed the extent to which defendant was entitled to the protections of N.C.G.S. §§ 14-51.2 and 14-51.3, "which include[ ] a presumption that his belief [in the need to use deadly force] was reasonable if he was attacked in his own home." According to defendant, the existence of this discussion sufficed to preserve his challenge to the trial court's failure to deliver the relevant instruction to the jury, with the Court of Appeals having "muddled this point by noting that [defendant] did not request [N.C.P.I. – Crim.] 308.80, which concerns the defense of habitation" despite the fact that defendant had refrained from requesting the delivery of this instruction in light of the fact that he did not claim to have been defending his habitation. In addition, defendant contends that the Court of Appeals erroneously concluded that he was not entitled to the protections made available pursuant to N.C.G.S. §§ 14-51.2 and 14-51.3 based upon *Crump* and that "[r]eview of this issue would necessarily include the propriety of the trial court's instructions on self-defense that did not include statutory language about the presumption that [defendant's] fear of death or great bodily harm was reasonable."

¶ 34 The State, on the other hand, argues that the second of the two issues that defendant seeks to present for our consideration was not properly before the Court because this issue "was not stated in the [discretionary review] petition at all," with defendant having "never suggested . . . that the Court of Appeals erred by approving the omission of an instruction on the presumption established by" N.C.G.S. § 14-51.2(b). In addition, the State contends that "[d]efendant did not request any instruction that

the jury should presume his fear of death or bodily harm was reasonable" or argue "that the trial court plainly erred by omitting that instruction." As far as the merits of the second of defendant's two claims is concerned, the State contends that "the justification described in Sections 14-51.2 and 14-51.3 is not available to a person who used defensive force and who was committing a felony," citing N.C.G.S. § 14-51.4 (2019). Finally, the State asserts that defendant had "fail[ed] to explain how the omission of an instruction the jury should presume he had a reasonable fear of death or great bodily harm affected the result." As a result, for all of these reasons, the State urges us to refrain from granting any relief from the trial court's judgments on the basis of the second of defendant's instructional arguments.

¶ 35 The language that defendant believes that the trial court erroneously failed to include in its jury instructions, which refers to the fact that defendant was "presumed to have held a reasonable fear of imminent death or serious bodily harm" when assaulted in this own home, is taken verbatim from N.C.P.I. – Crim. 308.80. For that reason, instead of "muddling" defendant's argument, the Court of Appeals did nothing more than make reference to the source from which defendant derived his requested jury instruction. Moreover, as the Court of Appeals indicated, the transcript of the jury instruction conference shows that defendant never requested the trial court to instruct the jury that he was presumed to have a reasonable fear of imminent death or great bodily injury as a result of the fact that he had been assaulted in his home. Instead, defendant simply requested, as we have already discussed, that the trial court instruct the jury in accordance with N.C.P.I – Crim. 308.10 before engaging in a colloquy with the prosecutor and the trial court concerning the extent to which defendant's status as a felon in possession of a firearm precluded the delivery of an instruction like that contained in N.C.P.I. – Crim. 308.10.

¶ 36 A careful review of the record satisfies us that, contrary to defendant's contention, a request to be afforded the protections made available by N.C.G.S. §§ 14-51.2 and 14-51.3 does not preserve his right to complain about the trial court's failure to instruct the jury in accordance with every sentence or clause contained in those statutory provisions. Instead, North Carolina Rule of Appellate Procedure 10(a)(2) requires that a party seeking to challenge an alleged instructional error on appeal must either specifically request an instruction that the trial court fails to deliver or object to the trial court's failure to deliver the relevant instruction in a timely manner. Defendant did not take either of these steps. As a result, since defendant failed to lodge an adequate objection to the

trial court's failure to instruct the jury that defendant was presumed to have had a reasonable fear of imminent death or great bodily injury as required by Appellate Rule 10(a)(2) and since defendant failed to argue that the omission of the relevant instruction constituted plain error, *Bell*, 359 N.C. at 27, we will refrain from addressing this aspect of defendant's challenge to the trial court's instructions on the merits and decline to disturb the trial court's judgments on the basis of the second of the two contentions that defendant has advanced before this Court.

III. Conclusion

¶ 37 Thus, for the reasons set forth above, we hold that the trial court did not err by declining to instruct the jury in accordance with N.C.P.I. – Crim. 308.10 and that defendant has not preserved for any type of appellate review his challenge to the trial court's decision not to instruct the jury in accordance with N.C.P.I. – Crim. 308.80 that he was "presumed to have held a reasonable fear of imminent death or serious bodily harm to himself" in light of the fact that he had been attacked in his own home. As a result, we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice HUDSON dissenting.

¶ 38 There is a significant difference between a person who, when unilaterally attacked in his own home, has the right to defend himself or herself with deadly force "regardless of the character of the assault," and a person who has the right to defend himself or herself with deadly force only if he or she has a reasonable belief that such force is "necessary . . . to save [himself or herself] from death or great bodily harm." In my view, that difference should be dispositive here. Because defendant was entitled to jury instructions that clearly established his right to self-defense "regardless of the character of the assault," I would hold that the trial court prejudicially erred in ruling otherwise. Accordingly, I respectfully dissent.

¶ 39 The key facts are clear and undisputed. After initially welcoming Damon Dry into his home, defendant told Dry to leave. Dry refused and instead pushed defendant against the sink and demanded money. Defendant pushed Dry off of him, opened the door, and again told him to leave. Dry pushed defendant into the door, again demanding money. A fight ensued. Defendant ran to his bedroom, retrieved his handgun, pointed it at Dry, and again told him to leave. When Dry subsequently charged at defendant, defendant shot Dry twice in the chest. Dry died

from the wounds. In light of these undisputed facts, defendant's trial largely revolved around a single issue: whether defendant's killing of Dry was justified under his right to self-defense.

¶ 40 At trial, defendant requested that the trial court instruct the jury regarding his right to self-defense using N.C.P.I. – Crim. 308.10. In pertinent part, this instruction informs the jury that:

> If the defendant was not the aggressor and the defendant was [in the defendants own home][,] . . . the defendant could stand the defendant's ground and repel force with force *regardless of the character of the assault being made upon the defendant*.

N.C.P.I. – Crim. 308.10 (emphasis added). However, the trial court determined that defendant was not eligible for this instruction because: (1) N.C.G.S. § 14-51.4(1), one of the statutes from which defendant's requested jury instruction is derived, states that "th[is] justification . . . is not available to a person who . . . [w]as attempting to commit, committing, or escaping after the commission of a felony"; and (2) defendant, at the time of the shooting, was "committing" the felony of being a felon in possession of a firearm. Instead of the requested instruction, the trial court instructed the jury in accordance with N.C.P.I. – Crim. 206.10. The trial court instructed:

> The defendant would be excused of first degree murder and second degree murder on the grounds of self defense if, first, the defendant *believed it was necessary to kill the alleged victim in order to save the defendant from death or great bodily harm* and, second, the circumstances as they appeared to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness.
>
> In determining the reasonableness of defendant's belief, you should *consider the circumstances as you find them to have existed from the evidence, including the size, age and strength of the defendant as compared to the alleged victim, the fierceness of the assault, if any, upon the defendant, and whether the alleged victim had a weapon in the alleged victim's possession.*
>
> The defendant would not be guilty of any murder or manslaughter if the defendant acted in self defense

> and the defendant did not use excessive force under the circumstances.
>
> A defendant does not have the right to use excessive force. A defendant uses excessive force if a defendant uses more force than reasonably appeared to the defendant to be necessary at the time of the killing. It is for you, the jury, to determine the reasonableness of the force used by the defendant under all of the circumstances as they appeared to the defendant at the time.
>
> Furthermore, the defendant has no duty to retreat in a place where the defendant has a lawful right to be. The defendant would have a lawful right to be in the defendant's home. Therefore, in order for you to find the defendant guilty of first degree murder or second degree murder, the State must prove beyond a reasonable doubt, among other things, that the defendant did not act in self defense.

(Emphases added). Based on this instruction, the jury found defendant guilty.

¶ 41 On defendant's subsequent appeal, the Court of Appeals agreed with the trial court that defendant's ongoing felony—possessing a firearm as a felon—disqualified him from receiving jury instructions under N.C.P.I. – Crim. 308.10. *State v. Benner*, No. COA19-879, 2021 WL 978796 (N.C. Ct. App. Mar. 16, 2021) (unpublished). Specifically, the Court of Appeals relied on its previous decision in *State v. Crump*, 259 N.C. App. 144 (2018), *rev'd on other grounds*, 376 N.C. 375 (2020), that "the absence of a plain and explicit causal nexus [between the felony and the subsequent self-defense claim] enunciated in section 14-51.4(1) makes manifest that the General Assembly omitted it purposefully and intended to limit the invocation of self-defense in this instance solely to the law-abiding." *Id.* at 151. Noting that it was "bound by *Crump*," the Court of Appeals ruled that the trial court did not err by declining to instruct the jury under N.C.P.I. – Crim. 308.10. *Benner*, 2021 WL 978796, at *4.

¶ 42 Notably, though, in the time since the Court of Appeals ruled on this case below, this Court in *State v. McLymore* explicitly overruled *Crump*'s holding that the felony disqualifier within N.C.G.S. § 14-51.4(1) does not require a causal nexus. 2022-NCSC-12, ¶ 14. Rather, we held that N.C.G.S. § 14-51.4(1) "requires the State to prove an immediate causal nexus between a defendant's attempt to commit, commission

of, or escape after the commission of a felony and the circumstances giving rise to the defendant's perceived need to use force." *Id.* ¶ 1.

¶ 43 In light of *McLymore*, and because there is no causal nexus between defendant's possession of a firearm as a felon and the events giving rise to his need to exercise self-defense, it is clear that contrary to the rulings of the trial court and the Court of Appeals, defendant was *not* disqualified by N.C.G.S. § 14-51.4(1) from the justifications for defensive force enacted under N.C.G.S. §§ 14-51.2 and 14-51.3. Furthermore, the only reason that the trial court and the Court of Appeals provided for refusing to give defendant's requested instruction was that he was disqualified by N.C.G.S. § 14-51.4(1). In my view, defendant's request for a jury instruction reflecting those rights under N.C.P.I. – Crim. 308.10 was proper and should have been granted. Accordingly, the critical question here is whether "the instructions given by the trial court adequately convey the substance of defendant's proper request." *State v. Godwin*, 369 N.C. 604, 613 (2017) (cleaned up) (quoting *State v. Green*, 305 N.C. 463, 477 (1982)).

¶ 44 The majority answers this question in the affirmative: "the trial court included the substance of the instruction upon which defendant's challenge to the Court of Appeals' decision rests in the remainder of its instructions to the jury." Specifically, although the trial court plainly did not instruct the jury on defendant's right to repel force with force "regardless of the character of the assault[,]" the majority interprets this Court's use of that expression in *State v. Francis*, 252 N.C. 57 (1960), as "intend[ing] to make it clear that there was no distinction between a simple and felonious assault in determining whether a defendant in his own home had a duty to retreat before exercising the right of self-defense in his own home."[1] "For that reason," the majority continues, "a trial court need not use [that] expression . . . in the absence of a concern that the jury would believe that the nature of the assault that the victim had made upon the defendant had some bearing upon the extent to which a defendant attacked in his own home has a duty to retreat before exercising the right of self-defense." Accordingly, because "the trial court [here] clearly informed the jury that defendant had no duty to retreat before exercising the right to defend himself in his own home," the majority concludes that the trial court "did not need to further clarify that defendant was entitled to exercise the right of self-defense 'regardless of the character of the assault.' "

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1. Notably, neither the trial court nor the Court of Appeals relied upon or even mentioned *State v. Francis*, 252 N.C. 57 (1960), in their reasoning supporting the denial of defendant's jury instruction request; they relied only upon the felony disqualifier under N.C.G.S. § 14-51.4(1) which, for the reasons noted above, is now inapplicable here.

¶ 45 I understand *Francis* differently and accordingly would reach a different conclusion. In *Francis*, the trial court instructed the jury that

> in determining the degree of force one may use [in self-defense], the law permits a person to use such force as reasonably necessary to protect himself, and he can even go to the extent of taking human life where it is necessary to save himself from death or great bodily harm, but if he uses more force than is reasonably necessary he is answerable to the law.

252 N.C. at 59. This instruction essentially recognized a right to proportional self-defense: the defendant would be justified in using deadly force in his home or place of business only if facing potentially deadly force himself.

¶ 46 On appeal, this Court determined that this portion of the jury instruction was erroneous because it "virtually eliminates the defendant's right of self-defense since he used a pistol in connection with defending himself against a simple assault." *Id.* "Ordinarily," we reasoned, "when a person[ ] who is free from fault in bringing on a difficulty[ ] is attacked in his own dwelling, . . . the law imposes upon him no duty to retreat before he can justify his fighting in self-defense,—*regardless of the character of the assault*." *Id.* (quoting *State v. Pennell*, 231 N.C. 651, 654 (1950)).

¶ 47 Where the majority above narrowly interprets this reasoning to indicate that the emphasized language was only "intended to make it clear that there was no distinction between a simple and felonious assault in determining whether a defendant had a duty to retreat in his own home[,]" I understand it to more broadly emphasize a defendant's right to engage in nonproportional self-defense within his home—that is, "he can justify his fighting in self-defense . . . *regardless of the character of the assault*." *Francis*, 252 N.C. at 59. Under this interpretation, instructing a jury that a defendant has no duty to retreat, which the trial court functionally did here, is plainly not the same as instructing a jury that a defendant may use force of a character different from that used by an attacker in repelling an attack in his home, which it did not.

¶ 48 Instead, the trial court here made the same misstep that the *Francis* Court ruled erroneous: it instructed the jury that the defendant's right to use deadly force in self-defense was contingent upon a reasonable belief that such force was necessary "in order to save the defendant from death or great bodily harm." It further instructed that the reasonableness of this belief depended on the essential proportionality of defendant's response in light of "circumstances . . . from the evidence, including the

size, age and strength of the defendant as compared to the alleged victim, the fierceness of the assault, if any, upon the defendant, and whether the alleged victim had a weapon in [his] possession." In doing so, just as in *Francis*, the trial court's "instruction virtually eliminate[d] the defendant's right of self-defense since he used a pistol in connection with defending himself against a simple assault." *Id.* I would hold that this constituted error.

¶ 49 Ultimately, though, while *Francis* helps inform the outcome here, it is not dispositive. Indeed, neither the trial court nor the Court of Appeals mentioned *Francis* in their analysis supporting the denial of defendant's requested jury instruction; they relied exclusively on the no longer viable reading of N.C.G.S. § 14-51.4(1)'s felony disqualifier as discussed by the Court of Appeals in *Crump*. *See McLymore*, 2022-NCSC-12, ¶ 14 (overruling *Crump*'s interpretation of the felony disqualifier and requiring a causal nexus). Instead, the critical question here is simply whether or not the given instructions "adequately convey[ed] the substance of defendant's proper [jury instruction] request." *Godwin*, 369 N.C. at 613 (quoting *Green*, 305 N.C. at 477). To answer this question, we need only compare the substance of the requested instruction—which, as noted above, defendant was entitled to in light of *McLymore*—with that of the given instruction.

¶ 50 Here, the given instruction omitted a key justification for defensive force enacted under N.C.G.S. §§ 14-51.2 and 14-51.3 as integrated into the requested instruction: that "defendant could stand [his] ground and repel force with force *regardless of the character of the assault being made upon* [*him*]." N.C.P.I. – Crim. 308.10 (emphasis added). Although we agree with the majority that the trial court's instruction that defendant had "no duty to retreat" is functionally the same as an instruction that defendant "could stand [his] ground," the given instruction still excludes a key element from N.C.P.I. – Crim. 308.10: instructing the jury that defendant's right to self-defense in his home operated "regardless of the character of the assault." Because the inclusion or omission of this phrase unilaterally determines whether or not defendant was justified in using a handgun to defend himself against Dry's physical attack on him, its omission by the trial court constitutes a meaningful substantive difference between the requested and given instructions. Accordingly, I would hold that the trial court and Court of Appeals erred below.

¶ 51 Further, I disagree with the majority that defendant has failed to establish that this error was prejudicial. Because defendant admitted that he shot Dry, the only question for the jury to resolve here was

whether defendant's actions were justified. By failing to give the defendant's requested instruction, the trial court's error bore on the only issue that the jury had to decide. Specifically, the jury instruction that was given limited the scope of what the jury could consider in determining whether defendant had the right to use deadly force even if it had not been wielded against him. In determining whether defendant's use of deadly force was justified, under the proper instruction, the jury would not necessarily need to consider whether Dry used a weapon, the nature of his assault on defendant, or his age, strength, or size. These factors directly speak to "the character of the assault being made upon defendant," which, under the proper instruction, would be irrelevant. Because the two instructions are clearly distinct, I would hold that the error was clearly prejudicial.

¶ 52 Finally, because I would find that the prejudicial error noted above independently requires reversal and remand, I would not reach the second issue regarding defendant's preservation of the instruction on the presumption of reasonable fear.

¶ 53 Accordingly, I respectfully dissent.

Justice EARLS joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
UTARIS MANDRELL REID

No. 20PA19-2

Filed 11 March 2022

Criminal Law—post-conviction motions—newly discovered evidence—Beaver factors—satisfied

The trial court did not abuse its discretion by granting defendant, who had been convicted of first-degree murder more than twenty years earlier, a new trial on the grounds of newly discovered evidence pursuant to N.C.G.S. § 15A-1415(c), where defendant satisfied the factors set forth in *State v. Beaver*, 291 N.C. 137 (1976). Despite some internal inconsistencies in the newly discovered testimony, the court properly found that the testimony was "probably true;" defendant's lawyer exercised due diligence in procuring the testimony—that is, the diligence reasonably expected from someone with limited information about the testimony—by hiring

an investigator to track down the witness; the testimony constituted material, competent, and relevant evidence where the State did not object to it and where it was admissible under the residual exception to the hearsay rule (Evidence Rule 803(24)); and the testimony—revealing another person's confession to committing the murder—was of a nature that a different result would probably be reached at a new trial.

Chief Justice NEWBY dissenting.

Justice BARRINGER joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 274 N.C. App. 100 (2020), reversing an order entered on 7 December 2018 by Judge C. Winston Gilchrist in Superior Court, Lee County. Heard in the Supreme Court on 5 January 2022.

Joshua H. Stein, *Attorney General*, *by Mary Carla Babb*, *Special Deputy Attorney General*, *for the State-appellee.*

Lauren E. Miller for defendant-appellant.

EARLS, Justice.

¶ 1 This case requires us to decide whether the Court of Appeals correctly held that the Superior Court, Lee County (MAR court) abused its discretion and committed legal error in granting defendant Utaris Mandrell Reid's motion for appropriate relief (MAR) and awarding him a new trial. Reid, who was fourteen years old when he was indicted for assaulting and robbing a cab driver who later died, was convicted of first-degree murder largely on the basis of a confession he made while being interrogated by a Sanford Police Department detective outside the presence of a parent or guardian. Years later, Reid's postconviction counsel located a man who claimed that on the night of the crime, another person came to his home and confessed to assaulting the cab driver, exculpating Reid. Based on what it deemed to be this man's "credible and truthful testimony," the MAR court allowed Reid's MAR based on newly discovered evidence, vacated his conviction, and ordered a new trial. The Court of Appeals reversed the MAR court's order. *State v. Reid*, 274 N.C. App. 100, 133 (2020). Because we conclude that the MAR court neither abused its discretion nor committed legal error in granting Reid a

new trial, we reverse the decision of the Court of Appeals, vacate Reid's conviction, and remand for a new trial.

I. Background

¶ 2 On the evening of 21 October 1995, John Graham was working as a driver for a taxicab company when he was assaulted and robbed. A police officer who arrived at the scene found Graham on the ground with severe head trauma. Graham was taken to the emergency room and remained hospitalized until he died from his injuries that December.

¶ 3 Two months after Graham was assaulted and robbed, an officer from the Sanford Police Department, Detective Jim Eads, interviewed fourteen-year-old Reid at the police station. Reid was read his *Miranda* rights and signed a waiver of his rights. The interview was not recorded, and no other person besides Detective Eads was present. According to Detective Eads, after he informed Reid that he was interviewing him in connection with Graham's death, Reid replied, "I am not going down for this by myself" and, in a rambling confession, admitted to assaulting Graham with three other boys—Elliot McCormick, Duriel Shaw, and Anthony Reid. Detective Eads transcribed defendant Reid's statement, which Reid signed. Reid was subsequently indicted for first-degree murder and robbery with a dangerous weapon. The three juveniles named by Reid were also charged with murder, but all charges against them were ultimately dismissed.

¶ 4 Reid was initially tried in October 1996. At trial, Detective Eads testified that officers interviewed Graham in the emergency room after the assault, where Graham indicated that he had been assaulted by two black males between the ages of sixteen and nineteen. The State did not present any blood, fingerprint, or DNA evidence or any eyewitness testimony, and no weapon was ever recovered. The trial ended in a mistrial due to a hung jury.

¶ 5 On 21 July 1997, Reid was tried for a second time. At this trial, the State again presented Reid's transcribed confession. The State also again presented testimony from Detective Eads, who clarified that while Graham could not communicate "verbally" with officers when he was interviewed at the hospital, he did "attempt to shake his head, yes or no," which Detective Eads "took . . . as a response" "[i]n a fashion." Finally, the State presented testimony from John Love, one of Graham's coworkers, who stated that he came to the crime scene after hearing Graham radio for help. According to Love, while Graham was lying injured, Love asked Graham who the perpetrators were, and Graham responded "L.L., McCormick, and Reid." Love explained that he did not report this

information to officers who interviewed him at the crime scene because he "didn't put together" what Graham was talking about until after Reid's first trial.

¶ 6 Reid presented an alibi defense supported by testimony from family members who claimed he had spent the day the crime occurred in their presence. He also presented testimony from a neuropsychologist who examined Reid's transcribed confession and opined that it was written at a higher grade level than Reid functioned at. In addition, Reid filed a motion to suppress the transcribed confession. The trial court denied the motion, concluding that Reid "knowingly, willingly and understandingly" waived his rights and signed the confession prepared by Detective Eads.

¶ 7 Ultimately, Reid was convicted of first-degree murder and common law robbery. He was sentenced to life imprisonment without parole. On direct appeal, Reid argued that the trial court erred in denying his motion to suppress his confession. The Court of Appeals found no error, holding that "[w]hile a defendant's subnormal mental capacity is a factor to be considered in determining whether the defendant's waiver of rights is intelligent, knowing and voluntary, such lack of intelligence, standing alone, is insufficient to render a statement involuntary if the circumstances otherwise indicate that the statement is voluntarily and intelligently made." *State v. Reid*, No. COA98-1392, slip op. at 4 (N.C. Ct. App. Oct. 19, 1999) (unpublished).

A. The motion for appropriate relief.

¶ 8 On 6 May 2011, Reid filed a MAR and motion for postconviction discovery asserting that his sentence of life imprisonment without parole was unconstitutional under the Eighth Amendment as interpreted by the United States Supreme Court in *Graham v. Florida*, 560 U.S. 48 (2010). His motion was summarily denied based on the determination that Reid had failed to allege a factual or legal basis upon which the MAR court could grant relief.

¶ 9 On 11 August 2011, Reid filed a motion for reconsideration of the trial court's order denying his MAR and motion for postconviction discovery. In support of this motion, Reid submitted an affidavit from William McCormick, a childhood friend of Reid's and the brother of Elliot McCormick, one of the juveniles Reid implicated in his confession, stating that: (1) on the night of the assault, William McCormick was at his mother's house with Reid; (2) Robert Shaw, Norman Cox, and Antonio Bristow came to McCormick's home "sweating and out of breath"; and (3) the next day, Shaw confessed to William McCormick

that he, Cox, and Bristow had robbed and assaulted Graham. William McCormick stated that he "was not interviewed by the police or any attorneys involved in . . . Reid's case." On 8 February 2012, the MAR court granted Reid's motion for postconviction discovery, noting that "[a]n evidentiary hearing on Defendant's Motion for Appropriate Relief and subsequent amendments may be held on a later date to be determined by the presiding judge."

¶ 10 On 5 April 2013, Reid filed another MAR again alleging that he was entitled to relief based on the newly discovered evidence of William McCormick's testimony. The MAR court held evidentiary hearings on this MAR on 20 July, 4 October, and 30 November 2017. At the hearings, the MAR court heard testimony from William McCormick, who conveyed his recollection of Shaw's confession. McCormick also explained that he refused to talk to anyone about Shaw's confession at the time of Reid's trial because he had been living by a "street code."

¶ 11 The MAR court also heard testimony from Reid's trial counsel, Fred Webb, who stated that as part of his initial investigation, "people that [he] knew in the street" mentioned William McCormick as a person who had information regarding Graham's death. Webb testified that based on this information, he moved for and obtained funds for an investigator to "[l]ocate and interview the brother and mother of . . . Elliot McCormick, and any other witness who may have heard or seen anything concerning the night of October 21, 1995." However, Webb explained that the investigator was ultimately unable to "get to [the McCormick brothers] in order to get a statement from them about what happened."

¶ 12 On 7 December 2018, the MAR court entered an order containing sixty-seven findings of fact and eighteen conclusions of law granting Reid's MAR, vacating his conviction for first-degree murder, and ordering a new trial. The MAR court explained that having

> listened to the testimony and observed the demeanor of these witnesses, [it] finds that each gave credible and truthful testimony on every issue that was material to the findings of fact and conclusions of law which are necessary to reach a ruling on the issues raised in the instant matter. William McCormick was emotional during his testimony. His demeanor gave convincing force to his testimony.

Specifically, the MAR court found "[William] McCormick's testimony to be credible" because, among other reasons, "McCormick in fact has no motive to testify for Defendant other than to disclose the true facts

known to him." With respect to the credibility of McCormick's testimony, the MAR court noted its "emotional impact and persuasive effect." With respect to the likely impact of William McCormick's testimony on a jury, the MAR court found that this was "an extremely close case, tried once to a hung jury, finally resulting in a conviction based largely on the purported confession of the fourteen[-]year[-]old, mentally disabled Defendant."

¶ 13 On the basis of Reid's evidence and the testimony presented at the hearings, the MAR court concluded that Reid had proven by a preponderance of the evidence that William McCormick's testimony was "newly discovered evidence as defined by law" because: (1) the evidence could not have been discovered or made available at the time of Reid's trial despite counsel's "due diligence"; (2) the evidence had "a direct and material bearing upon [Reid's] guilt or innocence"; (3) the evidence was "probably true"; (4) the evidence was "competent, material[,] and relevant"; and (5) the evidence was likely to be admissible at trial under N.C.G.S. § 8C-1, Rules 803(24) and 804(b)(3). The State appealed pursuant to N.C.G.S. § 15A-1445(a)(2).[1]

B. The Court of Appeals opinion.

¶ 14 On appeal, the Court of Appeals reversed the MAR court's order. *State v. Reid*, 274 N.C. App. 100, 133 (2020). According to the Court of Appeals, the MAR court erred in concluding that Reid had proven by a preponderance of the evidence that McCormick's testimony was newly discovered evidence within the meaning of N.C.G.S. § 15A-1415(c). *Id.* at 128. In addressing this question, the Court of Appeals applied the seven-part test articulated by this Court in *State v. Beaver*:

> In order for a new trial to be granted on the ground of newly discovered evidence, it must appear by affidavit that (1) the witness or witnesses will give newly discovered evidence; (2) the newly discovered evidence is probably true; (3) the evidence is material, competent and relevant; (4) due diligence was used and proper means were employed to procure the testimony at trial; (5) the newly discovered evidence is not merely cumulative or corroborative; (6) the new evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness; and

1. N.C.G.S. § 15A-1445(a)(2) provides that "the State may appeal from the superior court . . . [u]pon the granting of a motion for a new trial on the ground of newly discovered or newly available evidence *but only on questions of law*." N.C.G.S. § 15A-1445(a) (2021) (emphasis added).

> (7) the evidence is of such a nature that a different result will probably be reached at a new trial.

Id. at 124 (quoting *State v. Beaver*, 291 N.C. 137, 143 (1976)). According to the Court of Appeals, Reid failed on multiple prongs of the *Beaver* test. *Id.* at 133.

¶ 15 First, the Court of Appeals held that Reid had failed to establish that William McCormick's recollection of Shaw's confession was probably true. *Id.* at 126. According to the Court of Appeals, there were numerous inconsistencies within William McCormick's affidavit and between the affidavit and his later testimony—such as William McCormick's conflicting accounts regarding when Shaw first told him about assaulting Graham, the time of night Shaw arrived at his home, and whether his mother was home or at work when Shaw arrived—that were "impossible to reconcile." *Id.* at 125–26. Thus, "[i]n light of McCormick's conflicting affidavit and inconsistent testimony, [Reid] failed to demonstrate by a preponderance of the evidence that the information provided by McCormick is probably true." *Id.* at 126.

¶ 16 Second, the Court of Appeals held that McCormick's testimony was not "unknown or unavailable to" Reid at the time of trial. *Id.* at 128 (quoting *State v. Wiggins*, 334 N.C. 18, 38 (1993)). The court reasoned that despite being aware William McCormick may have possessed information about Graham's death at the time of Reid's trial, Webb failed "to utilize available procedures to secure McCormick's statement or testimony," such as "(1) issu[ing] a subpoena, (2) request[ing] a material witness order, (3) request[ing] a recess, (4) mak[ing] a motion to continue, (5) alert[ing] the trial court to the existence of this information, or (6) otherwise preserv[ing] this information in the record at trial." *Id.* at 127 (citing *State v. Smith*, 130 N.C. App. 71, 77 (1998)). Further, according to the Court of Appeals, William McCormick was "actually present at [Reid's] trial," but Webb "failed to speak with McCormick despite knowing that [he] may have information concerning Graham's death." *Id.* Therefore, the Court of Appeals concluded that Reid "failed to exercise due diligence in procuring McCormick's testimony" at trial. *Id.* at 129.

¶ 17 Third, the Court of Appeals held that the MAR court abused its discretion in concluding that McCormick's testimony was "competent, material[,] and relevant." *Id.* The Court of Appeals explained that under Rule 803(24), a party must give proper notice before offering hearsay testimony as evidence. *Id.* at 131. However, "there is no evidence in the record that [Reid] filed a proper notice of intent to offer hearsay evidence pursuant to Rule 803(24) prior to hearing the motion for appropriate

relief." *Id.* at 132. Accordingly, the Court of Appeals concluded that "the [MAR] court abused its discretion when it concluded the written notice requirement had been satisfied." *Id.*

¶ 18 Finally, the Court of Appeals held that the MAR court erred in concluding that Reid's "due process rights would be violated if he were not allowed to present McCormick's testimony at a new trial." *Id.* According to the Court of Appeals, the proper way to decide whether due process requires the court to allow a defendant to present new evidence is by applying the *Beaver* test "to determine whether to grant a new trial." *Id.* at 133. Based on its conclusion that Reid "has failed to satisfy the *Beaver* factors discussed above," the Court of Appeals held that "the [MAR] court erred in concluding that Defendant's constitutional rights would be violated if he did not have the opportunity to present the purported newly discovered evidence." *Id.*

¶ 19 In a brief concurring opinion, Judge Dietz agreed with the majority that Reid's trial counsel was aware "that William McCormick had information that implicated other people, but not Reid, in the crime" and that counsel's failure to exercise any of the "many options . . . in this situation to secure the testimony of [an] evasive witness" meant that McCormick's testimony was not, "when it finally came to light, newly discovered evidence under our post-conviction jurisprudence." *Id.* at 134 (Dietz, J., concurring). However, Judge Dietz expressed his view that "the failure to secure this testimony at the time of trial implicates Reid's constitutional right to the effective assistance of counsel," noting that the Court of Appeals' resolution of the case "does not bar Reid from seeking post-conviction relief on other grounds." *Id.* (Dietz, J., concurring).

¶ 20 Reid filed a petition for discretionary review, which was allowed by order of this Court in conference on 14 April 2021.

II. Standard of Review

¶ 21 Upon filing a MAR, the burden is on the moving party to prove "by a preponderance of the evidence every fact essential to support the motion." *State v. Eason*, 328 N.C. 409, 434 (1991). "[A] new trial for newly discovered evidence should be granted with the utmost caution and only in a clear case, lest the courts should thereby encourage negligence or minister to the litigious passions of men." *State v. Davis*, 203 N.C. 316, 323 (cleaned up), *cert. denied*, 287 U.S. 668 (1932).

¶ 22 However, "[t]he decision of whether to grant a new trial in a criminal case on the ground of newly discovered evidence is within the trial

court's discretion and is not subject to review absent a showing of an abuse of discretion." *State v. Rhodes*, 366 N.C. 532, 535 (2013) (quoting *Wiggins*, 334 N.C. at 38). In general, "[a]ppellate courts review trial court orders deciding motions for appropriate relief 'to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.' " *State v. Hyman*, 371 N.C. 363, 382 (2018) (quoting *State v. Frogge*, 359 N.C. 228, 240 (2005)). "[T]he trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' " *Id.* (alteration in original) (quoting *State v. Buchanan*, 353 N.C. 332, 336 (2001)). A MAR court abuses its discretion only if its ruling was "so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777 (1985).

III. Analysis

¶ 23 Both parties agree that, as a general matter, the *Beaver* test governs when assessing whether a defendant is entitled to a new trial on the basis of newly discovered evidence. The parties disagree as to whether the Court of Appeals properly applied the test in this case.

¶ 24 Reid contends that the Court of Appeals usurped the role of the MAR court when it "looked beyond the [MAR] court's supported [factual] findings" and reweighed the evidence based on its own assessment of the relative credibility of the witnesses who testified at the evidentiary hearing. According to Reid, the MAR court's threshold determination that William McCormick's account of Shaw's confession was "probably true" is a "factual determination" that is binding on appeal because it was supported by "ample" evidence in the record. Further, Reid argues that the Court of Appeals erred in concluding that his trial counsel did not exercise due diligence in attempting to elicit William McCormick's testimony and in concluding that this evidence was not "competent" because it was inadmissible.

¶ 25 In response, the State contends that the Court of Appeals appropriately concluded Reid failed to satisfy the "rigorous" and "difficult-to-meet" *Beaver* test. In the State's view, the MAR court's determination that William McCormick's affidavit and testimony were probably true "is a conclusion of law, or at the very least, a mixed finding of fact and conclusion of law, reviewable de novo on appeal." Further, the State argues that the Court of Appeals correctly concluded that Reid did not "carry [the] very heavy burden . . . [of] establishing the exercise of due diligence" in seeking William McCormick's testimony at trial and that the

MAR court abused its discretion in concluding that his testimony was material, competent, and relevant.

¶ 26 We agree with Reid that the Court of Appeals overstepped in displacing the MAR court's finding that William McCormick's recollection of Shaw's confession was probably true, a factual determination that was supported by evidence in the record. In addition, the MAR court did not commit any error of law in its application of the *Beaver* test and did not abuse its discretion in concluding that Reid was entitled to a new trial on the basis of newly discovered evidence. Accordingly, we reverse the decision of the Court of Appeals.

A. What is probably true is a question of fact.

¶ 27 In order to demonstrate that he was entitled to a new trial, Reid was required to establish that William McCormick's recollection of Shaw's confession was "probably true." *Beaver*, 291 N.C. at 143. To determine if McCormick's testimony was probably true, the MAR court needed to "weigh evidence, assess witness credibility, assign probative value to the evidence and testimony, and determine what the evidence proves or fails to prove." *State v. Moore*, 366 N.C. 100, 108 (2012). These are all tasks that can only be performed by the factfinder, who "sees the witnesses, observes their demeanor as they testify and . . . is given the responsibility of discovering the truth." *State v. Cooke*, 306 N.C. 132, 135 (1982) (quoting *State v. Smith*, 278 N.C. 36, 41 (1971)). Determining whether evidence is probably true requires the factfinder to perform its quintessential functions to "discover[ ] the truth," *id.*; thus, determining whether evidence is probably true is a factual question to be resolved by the MAR court.

¶ 28 The Court of Appeals held that the MAR court erred in determining that Reid's evidence was probably true because there were some inconsistencies internal to William McCormick's affidavit and discrepancies between his affidavit and subsequent testimony at the evidentiary hearing. But, as the State correctly acknowledges, "inconsistencies and conflicts in the evidence do not render a trial court's findings of fact unsupported by evidence and reviewable on appeal." Rather, as we have repeatedly emphasized, the fact that evidence presented to a MAR court is conflicting or contains discrepancies is not a reason for an appellate court to disregard the MAR court's factual findings based on that evidence. *See*, *e.g.*, *State v. Allen*, 378 N.C. 286, 2021-NCSC-88, ¶ 24 ("The MAR court's factual findings are binding . . . if they are supported by evidence, even if the evidence is conflicting." (cleaned up)). Indeed, the factfinder's function is to "resolve" any "[c]ontradictions and discrepancies" appearing in the evidence. *State v. McDaniel*, 372 N.C. 594, 603

(2019). On appeal, the reviewing court's only role, "even [if] the evidence is conflicting," is to "determine whether the findings of fact are supported by evidence." *State v. Stevens*, 305 N.C. 712, 720 (1982). Whatever inconsistencies there might be in Reid's evidence did not give the Court of Appeals license to replace the MAR court's facts with its own.

¶ 29 In order for the MAR court to determine that it was probably true Shaw had confessed to William McCormick, the court needed to find that McCormick was credible. That is precisely what the MAR court did: it entered numerous findings of fact specifically detailing the basis for its determination that McCormick was a credible witness, which included its own observations of McCormick's demeanor, his reasons for not coming forward near the time of Graham's death, his lack of any motivation to lie, and his maturation since his brother was murdered in 2000. A different factfinder might have assessed McCormick's credibility differently, but we cannot say that the MAR court's findings concerning McCormick's credibility were unsupported by the evidence. Thus, the MAR court's determination that McCormick was credible could not be displaced on appeal.

¶ 30 Reid bore the burden of proving by a preponderance of the evidence that McCormick's affidavit and testimony were probably true. Notwithstanding the Court of Appeals' suggestion to the contrary, this burden did not require him to "reconcile the discrepancies in the information provided by McCormick." *Reid*, 274 N.C. App. at 126. A trial court is entitled to "believe all that a witness testified to, or to believe nothing that a witness testified to, or to believe part of the testimony and to disbelieve part of it." *Brown v. Brown*, 264 N.C. 485, 488 (1965). Evidence that contains inconsistencies can still support a factual finding based upon the factfinder's assessment of the evidence and the credibility of its proponents. If it were otherwise—if only evidence without any discrepancies or inconsistencies could support a trial court's factual findings—our precedents instructing appellate courts to defer to the trial court's findings when the evidence is conflicting would be nonsensical.

¶ 31 Rather than defer to the MAR court's factual findings which were supported by evidence in the record, "the Court of Appeals engaged in the prohibited exercises of reweighing evidence and making witness credibility determinations, essentially making its own findings of fact in several areas where evidence presented to the [MAR court] was conflicting." *Brackett v. Thomas*, 371 N.C. 121, 127 (2018). Accordingly, the Court of Appeals erred in overruling the MAR court's determination that Reid had proven by a preponderance of the evidence that William McCormick's account of Shaw's confession was probably true.

B. The exercise of due diligence at trial.

¶ 32 The Court of Appeals also held that the MAR court abused its discretion in granting Reid a new trial because Reid had failed to prove by a preponderance of the evidence that "due diligence was used and proper means were employed to procure the testimony [being offered in support of his MAR] at trial." *Beaver*, 291 N.C. at 143; *see also* N.C.G.S. § 15A-1415(c) (2021). The MAR court entered two relevant findings of fact in support of its conclusion that Reid's trial counsel had exercised due diligence in attempting to procure William McCormick's testimony:

> 63. Before trial, Attorney Webb spoke to contacts "in the street" who had provided information that led him to believe Defendant was not involved in the crime. The names of the McCormick brothers, William and Elliott, came up as witnesses who had information that could be helpful to the defense. Attorney Webb moved for and secured funds to retain Investigator Mel Palmer for the specific purpose of locating and interviewing William McCormick. In the motions and orders for investigator funding, Attorney Webb specified that he was trying to locate William McCormick.
>
> 64. Investigator Palmer attempted to interview William McCormick, but was unable to locate him. Investigator Palmer made attempts to serve William McCormick with a subpoena but was unable to do so. McCormick's mother interfered with the investigator's efforts to locate William and would not allow him to be interviewed.

These findings of fact are supported by the evidence and binding on appeal.

¶ 33 The due diligence requirement does not demand that a defendant do everything imaginable to procure at trial the purportedly newly discovered evidence presented in a MAR. Rather, it requires the defendant to prove that he or she "could not, with *reasonable* diligence, have discovered and produced the evidence at the trial." *Beaver*, 291 N.C. at 143 (emphasis added); *see also Due Diligence*, Black's Law Dictionary (11th ed. 2019) (defining due diligence as "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation"). We have explained that "[w]hen the information presented by the purported newly discovered evidence was *known or available* to the defendant at the time of trial,

the evidence does not meet the requirements of N.C.G.S. § 15A-1415(c)." *State v. Rhodes*, 366 N.C. 532, 537 (2013) (emphasis added).

¶ 34 In this case, the MAR court did not commit legal error or abuse its discretion in concluding that William McCormick's testimony was neither known nor available to Reid or his counsel, Webb, at the time of trial. Neither Reid nor Webb knew that Shaw had confessed regarding his role in the murder to William McCormick; at most, Webb knew that his contacts "in the street" had identified William McCormick as someone who might possess information that could potentially benefit Reid. He had no knowledge of and no reason to know what that information was, or even whether it existed, at the time of trial. And William McCormick was decidedly not "available" to Reid and Webb; despite repeated efforts, the investigator hired by Webb was unable to locate William McCormick in order to interview him and ascertain what information McCormick possessed.[2]

¶ 35 Nevertheless, the Court of Appeals concluded that Reid and his counsel "failed to exercise due diligence in procuring McCormick's testimony." *Reid*, 274 N.C. App. at 129. As recounted above, the rationale for this conclusion was that Webb "could have secured McCormick's attendance to testify at trial" by, for example, issuing a subpoena or requesting a material witness order. *Id.* at 127. But the question is not whether there was any possible existing procedural mechanism by which Webb *could* have secured McCormick's appearance at trial; the question is whether utilizing any of these mechanisms would have been "reasonably expected" of someone who possessed the information Webb possessed. Judged against this standard, we disagree with the State that Webb's failure to issue a subpoena or request a material witness order means that the MAR court committed legal error or abused its discretion in determining that Webb exercised due diligence.

¶ 36 Due diligence does not require counsel to take speculative risks on the basis of rumors. Having only heard intimations that William McCormick possessed information that might have benefited his client—but having not been able to interview McCormick and having no

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2. Further, the State concedes that the MAR court made no finding—and there is no testimony in the record—supporting the Court of Appeals' assertion that Webb knew William McCormick was "actually present at [Reid's] trial." At most, there is testimony indicating that Webb saw William McCormick's family in the courthouse on one occasion but they "refused to even talk to [Webb]" and testimony indicating that William McCormick saw Reid in the courthouse on some unspecified occasion. The Court of Appeals exceeded its proper role as an appellate court in asserting the existence of a fact not found by the MAR court based on vague and ambiguous record evidence.

insight into the substance of the information McCormick may (or, as far as Webb knew, may not) have possessed—it would not have been reasonably expected of Webb to subpoena William McCormick to testify at trial. *Cf. Gatling v. Commonwealth*, 14 Va. App. 60, 63 (1992) ("[I]t is unreasonable to require, as an exercise of due diligence, that defense counsel call to the witness stand a witness as to whose testimony he is uninformed."). Similarly, it would not have been reasonably expected of Webb to submit an affidavit swearing that William McCormick "possesse[d] information material to the determination of the proceeding," given that he did not know what (if any) information McCormick possessed. N.C.G.S. § 15A-803(a) (2021). Finally, given that Webb had already tried and failed to locate William McCormick for an interview on multiple occasions, it would not have been reasonably expected of Webb to utilize any of the other procedural options identified by the Court of Appeals, such as requesting a recess or moving for a continuance. On the basis of the information Webb possessed at the time of trial, his actions in obtaining funding to hire an investigator who repeatedly attempted to locate and interview William McCormick constituted due diligence.

¶ 37 The facts of this case are distinguishable from the facts of prior cases in which this Court has held that a defendant failed to exercise due diligence at trial. For example, in *Beaver*, a defendant who was convicted of burglary asserted in a postconviction MAR that "while the jury deliberated" he learned detectives had located his former roommate, who would have testified that the defendant was living at the house he supposedly burglarized on the night the crime was committed. 291 N.C. at 142. This Court concluded that the MAR court did not abuse its discretion in denying the defendant's MAR because (1) the defendant himself testified at trial to the same facts the roommate would have presented; (2) the detectives who located the former roommate testified at trial and were available to be cross-examined by the defendant; and (3) the defendant knew the substance of the information the roommate would have testified to if he had been called at trial. Thus, the defendant "*should* have filed an affidavit before trial so stating and moved for a continuance to enable him to locate this witness." *Id.* at 144 (emphasis added). By contrast, in this case, no other witness who had knowledge of Shaw's confession testified at trial, no person who knew where William McCormick could be found testified at trial, and Webb was unaware of what information McCormick would have disclosed had he been located and compelled to testify.

¶ 38 Similarly, in *State v. Powell*, a defendant who was convicted of rape filed a MAR on the basis of newly discovered evidence in the form of

testimony from a woman who witnessed the defendant walking "hand in hand" with the victim around the time of the alleged crime. 321 N.C. 364, 370 (1988). This Court concluded that the woman's testimony was not newly discovered evidence because the defendant's attorney "examined [the special agent's] notes during the trial, at which time he learned of [the woman's] statement and [yet] he did not ask for a recess for the purpose of procuring [the woman] as a witness." *Id.* Because "[t]he evidence showed that the defendant *knew* of the statement of [the woman] during the trial," it was not an abuse of discretion to deny his MAR. *Id.* at 371 (emphasis added). By contrast, in this case, Reid and Webb did not learn Shaw confessed to William McCormick until an investigator was able to locate and interview McCormick many years after trial.

¶ 39 Most recently, in *Rhodes*, a defendant who was convicted of various drug offenses claimed he was entitled to a new trial on the basis of newly discovered evidence in the form of an affidavit alleging that the defendant had learned that "after the trial, [the defendant's father] told a probation officer that the contraband belonged to him." 366 N.C. at 534. However, the defendant had himself testified at trial and offered "no testimony regarding the ownership of the drugs." *Id.* at 538. In addition, although the defendant's father had invoked his Fifth Amendment right to avoid self-incriminating testimony when asked if he owned the drugs at trial, the defendant "did not pursue a line of questioning about whether the drugs belonged to [the defendant's father]" on direct examination of the defendant's mother, who co-owned with the defendant's father the home where the contraband was found. *Id.* Accordingly, we concluded that the defendant had failed to make the requisite "showing of due diligence" at trial. *Id.* By contrast, in this case, Reid had no way of knowing the substance of the information forming the basis of his MAR at the time of trial, and no person who did know such information testified.

¶ 40 Accordingly, on the facts as determined by the MAR court, the MAR court did not err as a matter of law or abuse its discretion in concluding that Reid had exercised due diligence in attempting to procure William McCormick's testimony at trial. Because neither Reid nor his counsel knew whether William McCormick actually possessed any information about Graham's killing, let alone whether that information would have benefitted Reid's case—and because Webb undertook proactive efforts to locate and interview McCormick before trial—Webb could not have been reasonably expected to utilize any of the additional procedural mechanisms identified by the Court of Appeals to compel McCormick's appearance at trial. As our precedents illustrate, on a different set of facts it might have been reasonably expected that Webb would do

something more than hiring an investigator to try to interview William McCormick; however, on this set of facts, we conclude that the MAR court did not err as a matter of law or abuse its discretion in concluding that Webb exercised due diligence.

C. Material, competent, and relevant evidence.

¶ 41 The Court of Appeals held that the MAR court abused its discretion in concluding that William McCormick's testimony was "competent" evidence because it was inadmissible hearsay. *Reid*, 274 N.C. App. at 129. As explained above, the sole basis for this conclusion was that Reid had failed to "file[ ] a proper notice of intent to offer hearsay evidence pursuant to Rule 803(24) prior to hearing the motion for appropriate relief." *Id.* at 132. Although the Court of Appeals was correct that Reid bore the burden of proving that the evidence he presented in support of his MAR was "material, competent[,] and relevant," *Beaver*, 291 N.C. at 143, the Court of Appeals' analysis misses the mark for two reasons.

¶ 42 First, if the Court of Appeals is correct that evidence in support of a MAR is competent if it is admissible at the evidentiary hearing on the MAR, then the Court of Appeals erred in concluding that McCormick's testimony was inadmissible for lack of proper notice. In its reply brief at the Court of Appeals, the State conceded that it "did not object at the time defendant offered McCormick's testimony at the MAR hearing" and thus "waived appellate review of the MAR court's . . . admission of McCormick's testimony at the MAR hearing by not objecting." In its brief at this Court, the State concedes that it "knew McCormick would testify [at the MAR hearing] and did not object to his testimony." Evidence that is admitted without objection is competent evidence. *See State v. Bryant*, 235 N.C. 420, 423 (1952) ("While some of the evidence offered by the State might have been excluded as hearsay, it was admitted without objection, and hence . . . may be considered with the other evidence and given such evidentiary value as it properly may possess." (citation omitted)). Thus, if the test for competence is admissibility at the MAR hearing, the Court of Appeals erred in concluding that McCormick's testimony was not competent evidence.

¶ 43 Regardless, we disagree with the Court of Appeals that admissibility at the MAR hearing is the test for competence. Rather, courts assess whether evidence would be material, competent, and relevant *in a future trial* if the defendant's MAR were granted in order to determine whether a new trial is warranted. *See, e.g.*, *State v. Nickerson*, 320 N.C. 603, 609–10 (1987) ("The rule for newly discovered evidence is that *in order for a new trial to be granted* . . . ." (emphasis added)).

Applying the proper test for competence, we conclude that the MAR court did not commit legal error or abuse its discretion in determining that McCormick's testimony would have been admissible under the residual exception, Rule 803(24).

¶ 44 The residual exception provides for the admission of "[a] statement not specifically covered by any" other hearsay exception but "having equivalent circumstantial guarantees of trustworthiness." N.C.G.S. § 8C-1, Rule 803(24) (2021). In order for evidence to be admissible under Rule 803(24), a court must make findings addressing the following six factors:

> (1) whether proper notice has been given, (2) whether the hearsay is not specifically covered elsewhere, (3) whether the statement is trustworthy, (4) whether the statement is material, (5) whether the statement is more probative on the issue than any other evidence which the proponent can procure through reasonable efforts, and (6) whether the interests of justice will be best served by admission.

State v. Valentine, 357 N.C. 512, 518 (2003). We have deemed the third factor, whether the testimony was trustworthy, the "most significant requirement." *State v. Smith*, 315 N.C. 76, 93 (1985). "When assessing trustworthiness, a court considers the following, non-exhaustive set of factors: '(1) assurances of the declarant's personal knowledge of the underlying events, (2) the declarant's motivation to speak the truth or otherwise, (3) whether the declarant has ever recanted the statement, and (4) the practical availability of the declarant at trial for meaningful cross-examination.' " *State v. Corbett*, 376 N.C. 799, 2021-NCSC-18, ¶ 41 (quoting *State v. Triplett*, 316 N.C. 1, 10–11 (1986)). "A trial court's determination as to the admissibility of hearsay statements pursuant to Rule 803(24) is reviewed for abuse of discretion." *Id.* ¶ 40.

¶ 45 In this case, the MAR court entered findings corresponding to all six admissibility factors:

> After careful scrutiny, the court concludes that the testimony of William McCormick about Robert Shaw's statement regarding the details of Shaw, Bristow and Cox assaulting the victim is admissible evidence under Rule 803(24). First, the State is on notice that Defendant would offer such evidence at trial. Second, this hearsay evidence is not specifically covered by any other exception in Rule 803. Third, the evidence

> possesses circumstantial guarantees of trustworthiness equivalent to other hearsay exceptions because it constitutes an admission of criminal conduct by Shaw, is consistent with events actually observed by William McCormick the day before, when Shaw and the other youths arrived at McCormick's house out of breath having jumped and run from a cab, and is consistent with known circumstances of the case, including that the victim was assaulted by more than one young male person. Fourth, the evidence is material to the case. Fifth, the evidence is more probative on the issue of whether Shaw, Bristow and Cox, rather than Defendant, were the actual perpetrators of these crimes than any other evidence procurable by reasonable efforts. Defendant cannot reasonably be expected to procure the in-court confession of Shaw that Shaw himself is guilty of robbery and first degree murder. Sixth, admission of the evidence of Shaw's statements will best serve the purposes of the Rules of Evidence and the interests of justice.

Further, with respect to the third factor, the MAR court specifically found that "(1) Shaw had personal knowledge of the events described; (2) Shaw had a strong motivation to confide the truth to his friend William McCormick and no reason to claim false responsibility for such serious acts which could expose him to criminal liability; and (3) there is no evidence that Shaw ever recanted his statement."

¶ 46 According to the State, these findings were insufficient to support the MAR court's conclusion that the evidence was admissible because "[t]here was no independent, non-hearsay evidence connecting Shaw, Cox, or Bristow to Graham's murder." However, we have never held that a trial court lacks the discretion to find hearsay evidence trustworthy in the absence of independent non-hearsay corroborating evidence. Rather, as we explained in the related context of examining the scope of the hearsay exception for declarations against penal interest, "the precise application of the standards of reliability must be left to the discretion of the trial judge." *State v. Haywood*, 295 N.C. 709, 729 (1978). In view of these findings, the MAR court's determination that McCormick's testimony was sufficiently trustworthy and admissible under the residual exception was not "manifestly unsupported by reason . . . [or] so arbitrary that it could not have been the result of a reasoned decision." *White*, 312 N.C. at 777.

D. Other claims that the MAR court abused its discretion.

¶ 47 In addition to the purported deficiencies in the MAR court's reasoning identified by the Court of Appeals, the State also argues before this Court that the MAR court abused its discretion in granting Reid a new trial because Reid "failed to establish McCormick's testimony showed that a different result would probably be reached at a new trial." Reid bore the burden of proving by a preponderance of the evidence that his newly discovered evidence was "of such a nature that a different result will probably be reached at a new trial." *Beaver*, 291 N.C. at 143. In this case, the MAR court concluded that

> [t]he newly discovered evidence is of such a nature as to show that [i]n another trial a different result will probably be reached . . . . This was an extremely close case, tried once to a hung jury, finally resulting in a conviction based largely on the purported confession of the fourteen-year-old, mentally disabled Defendant. No physical evidence connected Defendant to the case, and alibi evidence was offered. The addition of credible testimony from William McCormick will probably result in a different outcome than that reached in the original trial.
>
> . . . The testimony of William McCormick points directly to the guilt of specific persons and is inconsistent with Defendant's guilt.

¶ 48 The State takes issue with the MAR court's characterization of Reid's confession as "purported" in light of the Court of Appeals resolution of Reid's direct appeal, where the court held that his confession was admissible at trial. *See State v. Reid*, No. COA98-1392, slip op. at 4 (N.C. Ct. App. Oct. 19, 1999) (unpublished). We agree with the State that for the purposes of this appeal, Reid's confession was validly obtained and properly admitted. However, the State is wrong to suggest that because Reid's confession has been established to be admissible, any potential impact of McCormick's testimony at trial is automatically negated.

¶ 49 The question of how much probative weight to give a confession in determining a defendant's guilt is distinct from the question of whether the confession is admissible, and a factfinder is entitled to consider the circumstances surrounding a confession even after the confession has been admitted. *State v. Roache*, 358 N.C. 243, 286 (2004) (explaining that evidence was properly admitted because it "lent credibility" to a defendant's confession); *see also Crane v. Kentucky*, 476 U.S. 683, 689

(1986) ("[T]he physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence. Confessions, even those that have been found to be voluntary, are not conclusive of guilt."). Indeed, even after a trial court has denied a defendant's motion to suppress a confession, a defendant possesses a constitutional right to admit evidence regarding the circumstances surrounding the confession. *Crane*, 476 U.S. at 690. In this case, the unrecorded confession was elicited from a fourteen-year-old child with intellectual deficiencies who was interviewed in a police station outside the presence of a parent or guardian. There was no physical evidence, and limited corroborating evidence, connecting Reid to the crime scene. As the initial mistrial due to a hung jury illustrates, the evidence of Reid's guilt was not overwhelming. Accordingly, the MAR court did not abuse its discretion in determining that "a different result w[ould] probably be reached at a new trial" if McCormick's testimony were admitted. *Beaver*, 291 N.C. at 143.

IV. Conclusion

¶ 50 After a defendant has been convicted by a jury of his or her peers, the defendant "has the laboring oar to rebut the presumption that the verdict is correct." *State v. Casey*, 201 N.C. 620, 624 (1931). However, in this case, the MAR court did not abuse its discretion or commit legal error in concluding that Reid met his burden of proving by a preponderance of the evidence all elements necessary to demonstrate his entitlement to a new trial on the basis of newly discovered evidence. Accordingly, we reverse the decision of the Court of Appeals.

REVERSED.

Justice BERGER did not participate in the consideration or decision of this case.

Chief Justice NEWBY dissenting.

¶ 51 "[A] new trial for newly discovered evidence should be granted with the utmost caution and only in a clear case, lest the courts should thereby encourage negligence or minister to the litigious passions of men." *State v. Rhodes*, 366 N.C. 532, 536, 743 S.E.2d 37, 40 (2013) (alteration in original) (quoting *State v. Davis*, 203 N.C. 316, 323, 166 S.E. 292, 296 (1932)). "The defendant 'has the laboring oar to rebut the presumption that the verdict is correct and that he has not exercised due diligence in preparing for trial.' " *Id.* at 537, 743 S.E.2d at 40 (quoting *State v. Casey*,

201 N.C. 620, 624, 161 S.E. 81, 83 (1931)). "Under the rule as codified, the defendant has the burden of proving that the new evidence 'could not with due diligence have been discovered or made available at [the time of trial].' " *Id.* (alteration in original) (quoting N.C.G.S. § 15A-1415(c) (2011)); *see* N.C.G.S. § 15A-1420(c)(5), (6) (2021). Because the majority ignores these fundamental principles and significantly lowers the standard for "newly discovered evidence," I respectfully dissent.

¶ 52 Defendant has the burden to rebut the presumption that the evidence in question could not have been discovered by due diligence before the trial. Due diligence is "diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." *Due Diligence*, *Black's Law Dictionary* (11th ed. 2019). "When the information presented by the purported newly discovered evidence was known or available to the defendant at the time of trial," but the defendant fails to procure the information, due diligence was not exercised, and "the evidence [thus] does not meet the requirements of N.C.G.S. § 15A-1415(c)." *Rhodes*, 366 N.C. at 537, 743 S.E.2d at 40; *see State v. Beaver*, 291 N.C. 137, 144, 229 S.E.2d 179, 183 (1976); *State v. Powell*, 321 N.C. 364, 371, 364 S.E.2d 332, 336 (1988).

¶ 53 Three cases should control our analysis. In *Beaver* the defendant was convicted of first-degree burglary and later filed a motion for a new trial on the basis of newly discovered evidence. *Beaver*, 291 N.C. at 142, 229 S.E.2d at 182. The defendant argued that he was entitled to a new trial because the State concealed the whereabouts of a witness who could testify that the defendant was a resident of the house he allegedly burglarized. *Id.* The trial court denied the motion. *Id.* On appeal, this Court noted that the defendant had ample opportunity to examine the detectives who allegedly knew the witness's location but failed to do so. *Id.* at 144, 229 S.E.2d at 183. We also reasoned that "if [the] defendant considered [the witness] an important and material witness, he should have filed an affidavit before trial so stating and moved for a continuance to enable him to locate this witness." *Id.* Since the defendant failed to take such action, we concluded that he did not exercise due diligence in procuring the witness's testimony. *Id.* As such, we upheld the trial court's denial of the defendant's motion for a new trial. *Id.*

¶ 54 Similarly, in *Powell* the defendant filed a motion for appropriate relief (MAR) with the trial court seeking to overturn his conviction of first-degree rape. *Powell*, 321 N.C. at 370, 364 S.E.2d at 336. There the victim testified that while she was sitting on the beach in Kitty Hawk, the defendant approached her, drew a knife, forced her into a dune, and raped her. *Id.* at 366, 364 S.E.2d at 334. During the trial, the defendant's

counsel inspected notes that a special agent with the State Bureau of Investigation had made throughout his investigation of the incident. *Id.* at 370, 364 S.E.2d at 336. The notes showed that a witness to the incident informed the special agent that she had observed through binoculars a male and female enter the dunes and leave approximately twenty minutes later hand in hand. *Id.* Despite having access to this material information, the defendant's counsel never called the witness to testify at trial. *Id.* As such, when the defendant filed a post-conviction MAR arguing that the witness's statement to the special agent constituted newly discovered evidence, the trial court denied the motion, concluding that the defendant failed to exercise due diligence in procuring the witness's testimony. *Id.* On appeal, since the defendant's counsel was aware of the witness's statement but failed to procure her testimony, this Court upheld the trial court's denial of the MAR. *Id.* at 371, 364 S.E.2d at 336.

¶ 55 A defendant also fails to exercise due diligence where a witness refuses to testify to material information, but the information could have been discovered through pursuing a different line of questioning or speaking to other witnesses. *See Rhodes*, 366 N.C. at 537–38, 743 S.E.2d at 40–41. In *Rhodes* the defendant and his father were the subjects of a search warrant. *Id.* at 533, 743 S.E.2d at 38. When police executed the warrant at the defendant's residence, they found the defendant and his mother downstairs. *Id.* After the officers found drugs and paraphernalia at the residence, the defendant was charged with possession with intent to manufacture, sell, or deliver cocaine and possession of drug paraphernalia. *Id.* at 534, 743 S.E.2d at 38. At trial the defense presented testimony by the defendant, his mother, and his father. *Id.* The defendant's mother testified that the drugs did not belong to the defendant, but the defendant's counsel did not pursue a line of questioning regarding whether the drugs belonged to the defendant's father. *Id.* The defendant's father also testified that the drugs did not belong to the defendant. *Id.* When the defendant's father was asked whether the drugs belonged to him, however, he invoked his Fifth Amendment privilege against self-incrimination. *Id.* Lastly, the defendant testified to facts concerning the execution of the search warrant, but the defendant's counsel never asked the defendant about the ownership of the contraband. *Id.* The jury found the defendant guilty of the drug offenses. *Id.*

¶ 56 The defendant later filed a MAR based upon the theory of newly discovered evidence. *Id.* The defendant alleged that after the conclusion of the trial, the defendant's father told a probation officer that the contraband belonged to him. *Id.* The trial court concluded that due diligence was used to procure the testimony at trial, set aside the defendant's

conviction, and awarded a new trial. *Id.* at 535, 743 S.E.2d at 38–39. On appeal, this Court explained that despite the defendant's father's refusal to testify to the true ownership of the drugs, the information could have been made available by other means. *Id.* at 538, 743 S.E.2d at 40. We specifically noted that on direct examination of the defendant's mother, the defendant failed to pursue a line of questioning about whether the drugs belonged to the defendant's father and that the defendant gave no testimony regarding the ownership of the drugs. *Id.* Therefore, we held that the trial court erred in concluding as a matter of law that due diligence was used to procure the information. *Id.* Accordingly, we reversed the decision of the Court of Appeals which affirmed the trial court's decision to award the defendant a new trial. *Id.* at 533, 743 S.E.2d at 38.

¶ 57 Like the defendants in *Beaver*, *Powell*, and *Rhodes*, defendant here failed to take reasonable action to procure the evidence that he now deems "newly discovered." Defendant's trial counsel, Fred Webb, believed that William McCormick likely had information that could exculpate defendant. When asked at the MAR hearing whether he made any effort to locate McCormick during his pretrial investigation, Webb responded as follows:

> Yes, we did. I got contact through some of the people that I knew in the street who had brought up the names of other guys that they thought had done it, and they had indicated to me that they didn't think [defendant] was the one that did it and that it was – the McCormick names popped up in those conversations.
>
> After that, I talked with [the investigator] and explained to him that I needed him to locate the McCormick kids, but I told him also it's going to be difficult because I knew the McCormick kids' mother and I had heard that she was protecting them and keeping them from – keeping them not being available so people could talk to them.
>
> I approached her once down in the lower lobby of the courthouse in an effort to try to talk with them, and they refused to even talk to me.

¶ 58 The majority opines that Webb's mere hiring of a private investigator to locate McCormick establishes the exercise of due diligence. According to the majority, since Webb did not specifically know about Shaw's confession to McCormick, he should not have been expected to conduct further inquiry after McCormick's mother prevented Webb

from speaking with him. Whether Webb specifically knew about Shaw's alleged confession to McCormick is not the question. Instead, the question is whether Webb exercised due diligence as defined by our cases after being told that McCormick had information that would likely help his client.

¶ 59 The record evidence indicates that Webb's efforts were not reasonable. Though Webb hired a private investigator, McCormick's mother prevented the investigator from speaking with McCormick. Webb then ceased his investigatory efforts when he realized that circumventing McCormick's mother was "going to be difficult." But difficulty in obtaining information does not make that information unavailable. As our cases indicate, due diligence required more. The defense attorney should have sought some form of relief from the trial court in an effort to speak to McCormick or should have further questioned other witnesses about the identity of the murderers. As we explained in *Beaver*, "if defendant considered [McCormick] an important and material witness, he should have filed an affidavit before trial so stating." *Beaver*, 291 N.C. at 144, 229 S.E.2d at 183.

¶ 60 Further, our General Statutes provide several mechanisms for eliciting material information from a reluctant witness. For example, "[t]he presence of a person as a witness in a criminal proceeding may be obtained by subpoena." N.C.G.S. § 15A-801 (2021). And,

> [a] judge may issue an order assuring the attendance of a material witness at a criminal proceeding. This material witness order may be issued when there are reasonable grounds to believe that the person whom the State or a defendant desires to call as a witness in a pending criminal proceeding possesses information material to the determination of the proceeding and may not be amenable or responsive to a subpoena at a time when his attendance will be sought.
>
> . . . .
>
> . . . A material witness order may be obtained upon motion supported by affidavit showing cause for its issuance.

Id. § 15A-803(a), (d) (2021). Webb knew McCormick's address and even approached McCormick and his mother in the courthouse. Despite Webb's belief that McCormick possessed exculpatory information, however, he did not seek any form of relief from the trial court or otherwise.

Had Webb gone to the trial court for assistance, he likely could have gained access to McCormick and elicited his testimony.

¶ 61 Webb also could have discovered the relevant information by speaking to other witnesses or further questioning those he had already interviewed. For example, McCormick's brother likely had the same information as McCormick. Nonetheless, it does not appear that Webb or the private investigator attempted to speak with McCormick's brother or his attorney.

¶ 62 Further, Webb's testimony demonstrates that he spoke with several unnamed potential witnesses that had information related to the identity of the murderers. Webb, however, never explained the basis for these potential witnesses' belief that defendant was innocent nor had them testify at trial. If Webb knew these potential witnesses believed defendant was innocent and had information implicating other perpetrators, then Webb had an obligation to further investigate the extent of their knowledge. For example, Webb could have inquired into the identities and locations of the "other guys that [the potential witnesses] thought had done it." Instead, it appears that for reasons of his own, Webb declined to pursue these leads. Due diligence required Webb to conduct further investigation where he likely could have discovered the information that defendant now classifies as newly discovered.

¶ 63 Just as the identity of the true owner of the drugs was available to the defendant in *Rhodes* and just as the eyewitness testimony contained in the notes was available to the defendant in *Powell*, the fact that McCormick had possibly exculpatory information was available to defendant in the present case. As such, based upon our prior decisions, McCormick's testimony at the MAR hearing does not constitute newly discovered evidence. *See Beaver*, 291 N.C. at 144, 229 S.E.2d at 183; *Powell*, 321 N.C. at 371, 364 S.E.2d at 336; *Rhodes*, 366 N.C. at 538, 743 S.E.2d at 40. Nonetheless, the majority now lowers the due diligence bar, allowing a defendant to decline to interview a witness he believed to be material and to later file a MAR asserting that the witness's testimony is newly discovered.

¶ 64 In summary, our case law presumes that an underlying verdict is correct. When a defendant seeks a new trial based upon newly discovered evidence, there is a presumption that the defendant did not exercise due diligence in preparing for trial. It is the defendant's burden to overcome the presumption of lack of due diligence. Defendant could have discovered the information contained in McCormick's testimony through due diligence—i.e., issuing a subpoena, seeking a material witness order or

other court assistance in accessing McCormick, or further investigating the information known by other witnesses. Since defendant failed to pursue the available information, he is unable to establish a necessary element of his MAR. Though "[t]he decision of whether to grant a new trial in a criminal case on the ground of newly discovered evidence is within the trial court's discretion and is not subject to review absent a showing of an abuse of discretion," a trial court "by definition abuses its discretion when it makes an error of law." *Rhodes*, 366 N.C. at 535–36, 743 S.E.2d at 39 (first quoting *State v. Wiggins*, 334 N.C. 18, 38, 431 S.E.2d 755, 767 (1993), then quoting *Koon v. United States*, 518 U.S. 81, 100, 116 S. Ct. 2035, 2047 (1996)). Here the trial court made an error of law when it concluded that defendant "could not have discovered or made available the new evidence from McCormick with due diligence." The decision of the Court of Appeals should be affirmed. Therefore, I dissent.

Justice BARRINGER joins in this dissenting opinion.

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Onslow County
	)	
BRYAN CHRISTOPHER BELL	)	

No. 86A02-2

ORDER

This matter is before the Court pursuant to motions filed by the State on 10 February 2022. The State's request for expedited ruling is allowed, and this Court also allows the State's motion to hold defendant's appeal in abeyance and remand for an evidentiary hearing.

It is therefore ordered that this matter is remanded to the Superior Court of Onslow County for a joint evidentiary hearing with co-defendant Antwuan Sims on their claims of gender discrimination in jury selection under *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127 (1994). The trial court is hereby instructed to provide counsel for defendant Bell sufficient opportunity to prepare for this hearing and, thereafter, to proceed expeditiously to issue a ruling. Upon entry, the trial court's order shall be transmitted to this Court.

By order of the Court in conference, this the 17th day of February 2022.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17 day of February 2022.

s/Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

HOLMES v. MOORE

[380 N.C. 673 (2022)]

JABARI HOLMES, FRED CULP, DANIEL E. SMITH, BRENDON JADEN PEAY, AND PAUL KEARNEY, SR.	)	
v.	)	WAKE COUNTY
TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; DAVID R. LEWIS, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE HOUSE SELECT COMMITTEE ON ELECTIONS FOR THE 2018 THIRD EXTRA SESSION; RALPH E. HISE, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE SENATE SELECT COMMITTEE ON ELECTIONS FOR THE 2018 THIRD EXTRA SESSION; THE STATE OF NORTH CAROLINA; AND THE NORTH CAROLINA STATE BOARD OF ELECTIONS	)	

No. 342P19-2

ORDER

Pursuant to this Court's administrative order of 23 December 2021, and after thorough and thoughtful deliberation, I have concluded that I can and will be fair and impartial in deciding *Holmes v. Moore, et al.* (No. 342P19-2). Accordingly, the 15 January 2022 Motion for Disqualification filed therein is denied.

In reaching this conclusion, I thoughtfully considered: (1) the arguments presented by the parties; (2) my ethical responsibilities as an Associate Justice of the Supreme Court of North Carolina under our Code of Judicial Conduct; (3) my solemn oath to serve on our state's Court of last resort—rather than recusing myself or being disqualified to avoid controversy; and (4) my resulting judicial duty to all North Carolinians and my personal ability to discharge that duty.

For the reasons summarized above, the Motion for Disqualification is denied. This the 1st day of March 2022.

s/Tamara Patterson Barringer
Tamara Patterson Barringer

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of March, 2022.

s/Grant E. Buckner

GRANT E. BUCKNER
Clerk of the Supreme Court

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

11 MARCH 2022

3P22-2	Michael Buttacavoli v. Katherine Langley	1. Plt's Pro Se Motion to Require Judges to Apply the Law 2. Plt's Pro Se Motion for Extension of Time to File Appeal	1. Dismissed **02/18/2022** 2. Dismissed **02/18/2022** **Berger, J., recused**
13P22	Mary Cooper Falls Wing v. Goldman Sachs Trust Company, N.A., et al. ——— Ralph L. Falls, III, et al. v. Louise Falls Cone, et al. ——— Ralph L. Falls, III, et al. v. John T. Bode ——— In re Estate of Ralph L. Falls, Jr., deceased ——— Ralph L. Falls, III, et al. v. Goldman Sachs Trust Company, N.A., et al.	1. Defs' (Sellers and the Cone Family) PDR Under N.C.G.S. § 7A-31 (COA21-133) 2. Defs' (Sellers and the Cone Family) Petition for Writ of Certiorari to Review Decision of COA 3. North Carolina Association of Defense Attorneys' Motion for Leave to File Amicus Brief 4. North Carolina Association of Defense Attorneys' Motion for Extension of Time to File Amicus Curiae Brief	1. Allowed 2. Dismissed as moot 3. Allowed 4. Allowed
25P22	State v. Hussina Jacquelin Paktiawal	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA20-925)	Denied
27P22	State v. Dwight G. Daye	Def's Pro Se Motion for Miranda Rights Violation and Immediate Release	Denied **02/18/2022**
29P22	State v. Efren Ernesto Caballero	Def's PDR Under N.C.G.S. § 7A-31 (COA21-82)	Allowed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

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35P21	In the Matter of A.J.L.H., C.A.L.W., M.J.L.H.	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA20-267) 2. Petitioner's Motion for Temporary Stay 3. Petitioner's Petition for Writ of Supersedeas 4. Respondent-Father's Emergency Motion to Dissolve the Temporary Stay 5. Respondent-Father's Motion for Sanctions 6. Respondent-Mother's Motion for Sanctions 7. Guardian ad Litem's Motion to Withdraw and Substitute Counsel 8. Respondent-Father's Motion to Dissolve the Temporary Stay	1. 2. Allowed **01/21/2021** 3. 4. Denied **02/01/2021** 5. Denied 6. Denied 7. Allowed **02/17/2021** 8. Denied **02/17/2021**
39A22	State v. Robin Applewhite	1. Def's Notice of Appeal Based Upon a Dissent (COA20-610) 2. Def's PDR as to Additional Issues 3. State's Motion for Permission to Deliver Original Sealed Exhibit	1. 2. 3. Allowed **02/11/2022**
43P22	In the Matter of Robert Dudley	Petitioner's Pro Se Motion for Grievance	Dismissed
45P22	State v. Derrick Quentin McFadden	Def's Pro Se Motion to be Brought in Front of Magistrate	Denied **02/16/2022**
46P22	Thomas Shelly Long, Jr. v. Erik A. Hooks, Secretary, North Carolina Department of Public Safety, et al.	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **02/11/2022**
50P22	Juan Carlos Rodriguez-Garcia v. Eddie M. Buffaloe, Jr., Secretary, North Carolina Department of Public Safety, et al.	1. Petitioner's Pro Se Petition for Writ of Habeas Corpus (COAP15-982) 2. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis*	1. Denied **02/18/2022** 2. Allowed **02/18/2022**
54P22	State v. John Patrick Wimunc	Def's Pro Se Motion for Continuance (COAP22-17)	Dismissed **02/22/2022**
55P22	Alexander, et al. v. North Carolina State Board of Elections, et al.	1. Plts' Motion for Temporary Stay (COA21-77) 2. Plts' Petition for Writ of Supersedeas	1. Allowed **02/23/2022** 2.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

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65P22	State v. Donovan M. Williams	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County	Denied **03/02/2022**
66PA21	Pia Townes v. Portfolio Recovery Associates, LLC	Legal Aid of North Carolina's Motion to Admit Nadine Chabrier Pro Hac Vice (COA20-78)	Allowed **03/01/2022** **Ervin, J., recused**
67P22	In the Matter of Michael McRae	Plt's Pro Se Motion for Petition for Expedited Review and Emergency Order	Dismissed **03/04/2022**
68P21	State v. Leslie Ann McNeill and Timothy Edward Doolittle	1. Defs' Notice of Appeal Based Upon a Constitutional Question (COA19-819) 2. Defs' PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
70A21	Mark W. Ponder v. Stephen R. Been	1. Plt's Notice of Appeal Based Upon a Dissent (COA19-1021) 2. Def's Motion to Dismiss Appeal	1. --- 2. Denied
75P14-2	State v. Eric Rogers	1. Def's Petition for Writ of Certiorari to Review Order of the COA (COAP21-25) 2. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Scotland County	1. Denied 2. Denied **Ervin, J., recused; Berger, J., recused**
86A02-2	State v. Bryan Christopher Bell	1. State's Motion to Hold Appeal in Abeyance and Remand for Evidentiary Hearing 2. State's Motion to Expedite the Ruling on this Motion in the Interest of Judicial Economy 3. State's Motion to Hold Briefing Schedule in Abeyance 4. State's Motion to Hold Briefing Schedule in Abeyance	1. Special Order **02/17/2022** 2. Special Order **02/17/2022** 3. Allowed **02/11/2022** 4. Special Order **02/17/2022**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

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105P21	In the Matter of K.M., K.M.	1. Petitioner's Petition for Writ of Certiorari to Review Decision of COA (COA19-871) 2. Petitioner's Motion for Temporary Stay 3. Petitioner's Petition for Writ of Supersedeas	1. Denied 2. Allowed **07/14/2021** Dissolved **03/09/2022** 3. Denied
114P21	State v. Edwin Guillermo Perdomo	Def's PDR Under N.C.G.S. § 7A-31 (COA20-243)	Denied
129P04-5	Carl Edward Lyons v. Erik A. Hooks, Secretary of Public Safety, and Superintendent of Tabor Correctional Institution	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **02/16/2022**
131P16-23	State v. Somchai Noonsab	Def's Pro Se Motion for Pretrial Bond	Dismissed
131P21	State v. Nelson Gabri Guerrero-Avila	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-297) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
144P21	State v. Derrick Jervon Lindsay	Def's Pro Se Motion for Special Appearance and Protection of the Court	Dismissed
155A21	In the Matter of L.D., A.D.	Petitioner and Guardian ad Litem's Joint Motion to Strike Portions of the Record on Appeal and Portions of Respondent-Mother's Brief	Dismissed as moot
159P21	Robert E. Hovey and wife, Tanya L. Hovey v. Sand Dollar Shores Homeowners Association, Inc., and the Town of Duck	Plts' PDR Under N.C.G.S. § 7A-31 (COA20-423)	Denied
160P21	State v. Reginald Malker	Def's PDR Under N.C.G.S. § 7A-31 (COA20-449)	Denied

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179P21	State v. Willie Henderson Womble	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-364) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
196P21	State v. Sherry Lee Lance	1. Def's Motion for Temporary Stay (COA20-273) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/07/2021** Dissolved **03/09/2022** 2. Denied 3. Denied
215A21	In the Matter of M.S.L. a/k/a M.S.H.	Respondent-Father's Motion to Supplement the Record on Appeal	Allowed
216A21	In the Matter of L.Z.S.	1. Respondent-Father's Motion to Move Oral Argument to a Future Calendar 2. Respondent-Father's Motion in the Alternative to Allow Oral Argument to be Held Via Audio and Video Transmission 3. Respondent-Father's Motion to Withdraw Motions to Modify Oral Argument Date or Manner	1. --- **02/28/2022** 2. -- **02/28/2022** 3. Allowed **02/28/2022**
221P18-2	State v. Michael Eugene Bowden	1. Def's Pro Se Motion for Notice of Appeal 2. Def's Pro Se Motion for PDR 3. Def's Pro Se Petition in the Alternative for Writ of Certiorari to Review Order of COA	1. Dismissed *ex mero motu* 2. Denied 3. Dismissed
221A19-2	State v. Anton Thurman McAllister	Def's Pro Se Motion to Resolve State Court Matters (COA18-726)	Dismissed as moot **02/28/2022**
226P06-4	State v. De'Norris Levelle Sanders	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **02/25/2022**
228A21	C Investments 2, LLC v. Auger, et al.	1. Defs' (Arlene P. Auger, Herbert W. Auger, Eric E. Craig, Gina Craig, Stephen Ezzo, Janice Huff Ezzo, Ashfaq Uraizee, and Jabeen Uraizee) PDR as to Additional Issues (COA19-976) 2. Defs' (Ashfaq Uraizee and Jabeen Uraizee) Motion to Withdraw Appeal and PDR	1. Allowed **02/09/2022** 2. Allowed **02/17/2022**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

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231P21	C.E. Williams, III and wife, Margaret W. Williams, R. Michael James and wife, Katherine H. James, Strawn Cathcart and wife, Susan S. Cathcart, Mark B. Mahoney and wife, Noelle S. Mahoney, Plaintiffs v. Michael Reardon and wife, Karyn Reardon, Defendants and Jeffrey S. Alvino and wife, Kristina C. Alvino, et al., Necessary Party Defendants	1. Plts' and Necessary Party Defs' PDR Under N.C.G.S. § 7A-31 (COA20-450) 2. Plts' and Necessary Party Defs' Motion to Amend PDR	1. 2. Allowed **02/17/2022**
247P16-8	State v. Jonathan Eugene Brunson	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **03/01/2022**
265P21	State v. Vinston Levi Kearney, Jr.	1. State's Motion for Temporary Stay (COA20-486) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **07/26/2021** Dissolved **03/09/2022** 2. Denied 3. Denied 4. Dismissed as moot
266A21	In the Matter of A.L.I.	Respondent-Father's Motion to Amend Record on Appeal	Allowed
278P21	State v. Fernando Alvarez	1. State's Motion for Temporary Stay (COA20-611) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/06/2021** 2. Allowed 3. Allowed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

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342PA19-2	Holmes, et al. v. Moore, et al.	1. Plts' Motion for Disqualification of Justice Tamara Patterson Barringer 2. Plt's PDR Prior to Determination of COA 3. Plts' Motion for Expedited Consideration of PDR 4. Defs' Motion to Admit David H. Thompson Pro Hac Vice 5. Defs' Motion to Admit Peter A. Patterson Pro Hac Vice 6. Defs' Motion to Admit Joseph O. Masterman Pro Hac Vice 7. Defs' Motion to Admit Nicholas A. Varone Pro Hac Vice 8. Defs' Motion to Admit John W. Tienken Pro Hac Vice	1. Special Order **03/01/2022** 2. Allowed **03/02/2022** 3. Dismissed as moot **03/02/2022** 4. Allowed **03/10/2022** 5. Allowed **03/10/2022** 6. Allowed **03/10/2022** 7. Allowed **03/10/2022** 8. Allowed **03/10/2022**
353P21-4	State v. Travis Wayne Baxter	Def's Pro Se Motion for Notice of Review De Novo (COAP21-332)	Dismissed
357P17-2	State v. Fredrick L. Canady	1. Def's Pro Se Motion for Petition for Re-Sentence 2. Def's Pro Se Motion to Appoint Counsel 3. Def's Pro Se Motion for Grievance	1. Dismissed 2. Dismissed as moot 3. Dismissed **Berger, J., recused**
363A14-4	Gifts Surplus, LLC, et al. v. Sheriff of Onslow County, et al.	Plts' Motion for Court to Take Judicial Notice of Recent Legislative Action (COA14-85)	Allowed **02/11/2022** **Ervin, J., recused** **Berger, J., recused**
372P21	State v. Justin Stephen Herr	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-723) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed

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374P21	Fred Cohen, Executor of the Estate of Dennis Alan O'Neal, Deceased, and Fred Cohen, Executor of the Estate of Debra Dee O'Neal, Deceased v. Continental Motors, Inc. (f/k/a Teledyne Continental Motors, Inc. and/or Teledyne Continental Motors); and Aircraft Accessories of Oklahoma, Inc.	1. Def's (Continental Motors, Inc.) PDR Under N.C.G.S. § 7A-31 (COA20-418) 2. Plt's Motion to Admit Michael S. Miska Pro Hac Vice 3. Def's (Continental Motors, Inc.) Motion to Admit Lacey D. Smith Pro Hac Vice 4. Def's (Continental Motors, Inc.) Motion to Admit Sherri R. Ginger Pro Hac Vice 5. Def's (Continental Motors, Inc.) Motion to Admit Timothy A. Heisterhagen Pro Hac Vice	1. Denied 2. Denied 3. Allowed 4. Allowed 5. Allowed
376A20	James C. Button v. Level Four Orthotics & Prosthetics, Inc.; Level Four SBIC Holdings, LLC; Penta Mezzanine SBIC Fund I, L.P.; Rebecca R. Irish; and Seth D. Ellis	1. Plt's Petition for Writ of Certiorari from Business Court 2. Defs' Motion to Dismiss Appeal	1. Denied 2. Allowed
384P16-2	State v. Phillip Wayne Broyal	1. Def's Pro Se Motion for Notice of Appeal (COAP21-365) 2. Def's Pro Se Motion for Appointment of Counsel	1. Dismissed *ex mero motu* 2. Dismissed as moot
391P21	State v. Marcus L. Alston	Def's PDR Under N.C.G.S. § 7A-31 (COA20-691)	Denied
392P21	State v. Gordon Lawrence Cox, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA20-678)	Denied
394P21	Michael Mole' v. City of Durham, North Carolina, a municipality	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA19-683) 2. North Carolina Fraternal Order of Police's Motion for Leave to File Amicus Brief in Support of PDR	1. Allowed 2. Denied

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402A21	State v. Montez Gibbs	1. State's Motion for Temporary Stay (COA20-591)	1. Allowed **11/19/2021**
		2. State's Petition for Writ of Supersedeas	2. Allowed
		3. State's Notice of Appeal Based Upon a Dissent	3. ---
		4. Def's Motion to Strike Portions of the State's Brief	4.
		5. Def's Motion to Stay Briefing Until Resolution of the Motion	5.
		6. State's Petition for Writ of Certiorari to Review Decision of COA	6.
405P21	State v. Rakeem Montel Best	Def's PDR Under N.C.G.S. § 7A-31 (COA20-614)	Denied
413PA21	Harper, et al. v. Hall, et al., and NC League of Conservation Voters, et al. v. Hall, et al.	1. Plts' (Harper, et al.) PDR Prior to Determination by COA	1. Special Order **12/08/2021**
		2. Plts' (Harper, et al.) Motion to Suspend Appellate Rules to Expedite a Decision	2. Special Order **12/08/2021**
		3. Plts' (Harper, et al.) Motion for Prompt Disqualification of Justice Berger, Jr.	3. Special Order **01/31/2022**
		4. Plts' (Harper, et al.) Motion in the Alternative for Deferred Consideration of Disqualification Following the Court's Resolution of PDR Prior to a Determination by COA	4. Dismissed as moot **02/22/2022**
		5. Plts' (N.C. League of Conservation Voters, Inc., et al.) PDR Prior to Determination by COA	5. Special Order **12/08/2021**
		6. Plts' (N.C. League of Conservation Voters, Inc., et al.) Petition in the Alternative for Writ of Certiorari to Review Order of Superior Court, Wake County	6. Special Order **12/08/2021**
		7. Plts' (N.C. League of Conservation Voters, Inc., et al.) Motion to Suspend Appellate Rules and Expedite Schedule	7. Special Order **12/08/2021**
		8. Plts' (N.C. League of Conservation Voters, Inc., et al.) Petition for Writ of Supersedeas or Prohibition	8. Special Order **12/08/2021**
		9. Governor Roy A Cooper, III's and Attorney General Joshua H. Stein's Motion for Leave to File Amicus Brief	9. Dismissed as moot **02/22/2022**
		10. Plts' (N.C. League of Conservation Voters, Inc., et al.) Motion for Temporary Stay	10. Special Order **12/08/2021**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

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	11. Intervenors' (N.C. Sheriffs' Association, N.C. District Attorneys Association, and N.C. Association of Clerks of Superior Court) Motion to Intervene as Parties	11. Denied **01/24/2022**
	12. Intervenors' (N.C. Sheriffs' Association, N.C. District Attorneys Association, and N.C. Association of Clerks of Superior Court) Motion for Reconsideration of the Court's 8 December 2021 Order Staying the Candidate Filing Period	12. Dismissed **01/24/2022**
	13. Legislative Defs' Motion for Recusal of Justice Samuel J. Ervin, IV	13. Special Order **01/31/2022**
	14. Plts' (N.C. Conservation Voters, Inc. et al.) Notice of Appeal Pursuant to Special Order dated 8 December 2021	14. ---
	15. Plts' (Harper, et al.) Notice of Appeal Pursuant to Special Order dated 8 December 2021	15. ---
	16. Plts' (Harper, et al.) Renewed Motion for Disqualification of Justice Berger, Jr.	16. Special Order **01/31/2022**
	17. Plt-Intervenor's (Common Cause) Notice of Appeal Pursuant to Special Order dated 8 December 2021	17. ---
	18. Legislative Defs' Motion for Recusal of Justice Anita S. Earls	18. Special Order **01/31/2022**
	19. Plt-Intervenor's (Common Cause) Motion for Disqualification of Justice Berger, Jr.	19. Special Order **01/31/2022**
	20. Plts' (N.C. League of Conservation Voters, Inc., et al.) Motion to Admit Sam Hirsch, Jessica Ring Amunson, Zachary C. Schauf, Urja Mittal, and Kartik P. Reddy Pro Hac Vice	20. Allowed **01/21/2022**
	21. Plt-Intervenor's (Common Cause) Motion to Admit J. Tom Boer and Olivia T. Molodanof Pro Hac Vice	21. Special Order **01/21/2022**
	22. Legislative Defs' Motion to Admit Mark Braden Pro Hac Vice	22. Allowed **01/21/2022**
	23. Legislative Defs' Motion to Admit Katherine McKnight Pro Hac Vice	23. Allowed **01/21/2022**
	24. Plts' (Harper, et al.) Motion to Admit Elisabeth S. Theodore, R. Stanton Jones, Samuel F. Callahan, Abha Khanna, Lalitha D. Madduri, Jacob D. Shelly, and Graham W. White Pro Hac Vice	24. Motion Allowed in Part; Denied in Part **01/21/2022**

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	25. Buncombe County Board of Commissioners' Motion for Leave to File Amicus Brief	25. Allowed **01/24/2022**
	26. Campaign Legal Center's Motion for Leave to File Amicus Brief	26. Allowed **01/24/2022**
	27. Campaign Legal Center's Motion to Admit Christopher Lamar and Orion de Nevers Pro Hac Vice	27. Allowed **01/24/2022**
	28. Bipartisan Former Governors Michael F. Easley, Arnold Schwarzenegger, Christine Todd Whitman, and William Weld's Motion for Leave to File Amicus Brief	28. Allowed **01/24/2022**
	29. Plts' (Harper, et al.) Renewed Motion to Admit Elisabeth S. Theodore, R. Stanton Jones, Samuel F. Callahan, Jacob D. Shelly, and Graham W. White Pro Hac Vice	29. Allowed **01/24/2022**
	30. Governor Roy A. Cooper, III's and Attorney General Joshua H. Stein's Motion for Leave to File Amicus Brief	30. Allowed **01/24/2022**
	31. Professor Charles Fried's Motion for Leave to File Amicus Brief	31. Allowed **01/24/2022**
	32. Caroline P. Mackie's Motion to Admit Ruth M. Greenwood, Theresa J. Lee, and Nicholas O. Stephanopoulos Pro Hac Vice	32. Allowed **01/24/2022**
	33. NCLCV Plts', Harper Plts', and Plt Intervenor Common Cause's Motion for Extension of Time Allowed for Oral Argument	33. Allowed **01/26/2022**
	34. National Republican Congressional Committee's Motion for Leave to File Amicus Brief	34. Denied **01/31/2022**
	35. NC NAACP's Motion for Leave to File Amicus Brief	35. Allowed **01/31/2022**
	36. Plt-Intervenor's (Common Cause) Motion for Temporary Stay	36. Denied **02/23/2022**
	37. Plt's (Common Cause) PDR Prior to Determination by COA	37. Dismissed as moot **02/23/2022**
	38. Plts' (N.C. League of Conservation Voters, Inc., et al.) Notice of Appeal Pursuant to Special Orders dated 8 December 2021 and 4 February 2022	38. ---
	39. Defs' (Harper, et al.) Motion for Temporary Stay	39. Denied **02/23/2022**

		40. Defs' (Harper, et al.) Petition for Writ of Supersedeas	40. Denied **02/23/2022**
		41. Plts' (Harper, et al.) Notice of Appeal Pursuant to Special Orders dated 8 December 2021 and 4 February 2022	41. ---
		42. Plts' (Harper, et al.) Motion for Temporary Stay	42. Denied **02/23/2022**
		43. Plts' (Harper, et al.) Petition for Writ of Supersedeas	43. Denied **02/23/2022**
		44. Plts' (N.C. League of Conservation Voters, et al.) Motion for Temporary Stay	44. Denied **02/23/2022**
		45. Plts' (N.C. League of Conservation Voters, et al.) Petition for Writ of Supersedeas	45. Denied **02/23/2022**
		46. Plts' (N.C. League of Conservation Voters, et al.) Writ of Mandamus	46. Denied **02/23/2022**
		47. Plts' (N.C. League of Conservation Voters, Inc., et al.) Petition for Writ of Prohibition	47. Denied **02/23/2022**
		48. Plts' (N.C. League of Conservation Voters, et al.) Motion to Suspend Appellate Rules	48. Denied **02/23/2022**
		49. Plts' (N.C. League of Conservation Voters, Inc., et al.) Motion for Preliminary Injunction	49. Denied **02/23/2022**
		50. Governor Roy A. Cooper, III's and Attorney General Joshua H. Stein's Motion for Leave to File Amicus Brief	50. Allowed **02/23/2022**
		51. Plts' (N.C. League of Conservation Voters, Inc. et al.) Petition for Writ of Certiorari	51. Dismissed as moot **02/23/2022**
		52. Plt-Intervenor's (Common Cause) Notice of Appeal Pursuant to Special Orders dated 8 December 2021 and 4 February 2022	52. ---
419P21	In the Matter of the Estate of Michael Roger Chambers	Petitioners' PDR Under N.C.G.S. § 7A-31 (COA20-757)	Denied
420P21	State v. Devonte Glenn Jones	Def's PDR Under N.C.G.S. § 7A-31 (COA20-173)	Denied

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

11 MARCH 2022

455PA20	State v. Michael Ray Waterfield	Def's Motion for Order Abating this Action, Dissolving the Writ of Supersedeas, Dismissing the Appeal, and Vacating the Judgment (COA19-427)	Allowed **02/28/2022**
507P20	State v. Michael Ray Waterfield	1. Def's Motion for Temporary Stay (COA19-813)	1. Allowed **12/11/2020** Dissolved **02/28/2022**
		2. Def's Petition for Writ of Supersedeas	2. Dismissed as moot
		3. Def's PDR Under N.C.G.S. § 7A-31	3. Dismissed **02/28/2022**
		4. Def's Motion for Order Abating the Action, Dissolving the Temporary Stay, Dismissing the Petition, and Vacating the Judgment	4. Allowed **02/28/2022**

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